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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1911

No. 132

LOCAL 807, etc., et al.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONERS

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INDEX

	PAGE
Statement	1
The Indictments	2
The Statute	2
The Demurrer	4
The Facts	4
The History of the Legislation and the Judicial History of the Act	5
ARGUMENT—	
POINT I—The Anti-Racketeering Act is unconstitutional	8
A. The Federal Government has no general police powers under the Constitution, and it is specifically deprived of the power to protect the community against violence, that being left entirely to the States	9
B. The right to regulate interstate commerce is exclusive in the Federal Government	12
C. Whenever the Federal power to regulate steps in, the police power of the State steps out	13
D. There is no room for the exercise of concurrent power by both the Federal and State Governments	14
E. The States have no power to legislate in any field occupied by the Federal Government, no matter what the source of authority or the nature of the power exercised	16

PAGE

F. The Federal Government may regulate such portions of intra-state commerce as may affect interstate commerce; and when it does the principles applicable to interstate commerce are applicable to the intra-state commerce in question, and the States are ousted from the field thus occupied by the Federal Government 19

G. The Federal Government may not under the guise of regulating commerce deprive the States of powers expressly reserved to them 24

POINT II—If the Anti-Racketeering Act is constitutional the States have forever been deprived of the power to deal with the crimes of extortion and violence 26

A. "Concurrent Power" is a delusion, and if it were not a delusion it would create a situation such as no free people would tolerate 27

B. Congress clearly intended to occupy the ground and make the Federal Act exclusive in the field to which it applies 30

C. Exclusive jurisdiction would follow from our constitutional provisions embodying a universal principle of the civilized world; and a contrary intention of Congress would render the Act unconstitutional 33

D. In the absence of any constitutional or constitutionally valid Congressional provision for concurrent jurisdiction, the state courts can have no jurisdiction in any case in which the federal courts have jurisdiction 36

PAGE

POINT III—The construction placed upon the Act by the courts below is fraught with such danger to our entire governmental system that Congress cannot possibly be held to have intended such consequences even if it had the constitutional power to do so 38

A. If this law is constitutional and means what the courts below held it to mean, all racketeers, large and small, must be tried in the federal courts, and none may be tried by the state courts 38

B. As at present construed this Act must throw both our legal systems into utter confusion 43

POINT IV—If the constitutionality of the Act is to be saved it must be given the meaning of the law which Congress had intended to enact 45

A. The Act under consideration was part of a Legislative Program which must be considered in its entirety 46

B. The history of the Legislative Program 46

C. The Legislative Program 48

D. The Anti-Racketeering Act had the same purpose as the entire Legislative Program of which it was a part, and must be construed to cover a crime of similar legal import 51

E. The Act was intended to apply only to crimes of a certain magnitude 51

POINT V—The Anti-Racketeering Act does not apply to the case at bar 54

A. The dispute in this case was clearly a dispute involving wages 54

PAGE

B. This case involves a labor dispute and is, therefore, within the proviso of the statute 56

POINT VI—The matter involved in this case was of a local nature, and did not affect interstate commerce either in its constitutional or statutory meaning 58

POINT VII—The labor-union defendant is not a "person" within the meaning of the Act 60

POINT VIII—The indictment offends basic principles of criminal law and violates constitutional guarantees 62

A. The failure to charge that the defendants conspired to obtain money from a person specifically named, fails to inform the defendants of the "nature and cause" of the accusation, and also contravenes the provision that no one shall be prosecuted without an indictment by the Grand Jury 63

B. The indictment herein clearly exposes the defendants to the danger of double jeopardy 71

C. The failure to allege an overt act renders the indictment demurrable 77

CONCLUSION—The indictment herein should be dismissed 79

TABLE OF CASES

	PAGE
Adams Express Co. v. Croninger, 226 U. S. 491	14
Apex Hosiery Co. v. Leader, 310 U. S. 469	57
Atchison, T. & S. F. R. Co. v. Harold, 241 U. S. 371	14
Atchison, T. & S. F. R. Co. v. Moore, 233 U. S. 182	14
Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173	14
Baia, In re, 121 U. S. 1	65, 67, 69
Barrett v. New York, 232 U. S. 14	14
Bartell v. U. S., 227 U. S. 427	76
Boston Beer Co. v. Massachusetts, 97 U. S. 25	9
Bowman v. C. & N. Ry. Co., 125 U. S. 465	13
Burning of the Henry Clay, 2 Edm. Sel. Cas. 324	37
Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426	14
Chicago, St. P., M. & O. R. Co. v. Latta, 226 U. S. 519	14
Com. v. McCance, 164 Mass. 162	76
Commonwealth v. Eastman, 55 Mass. 189	76
Consolidated Edison v. N. L. R. B.	59
Gibbons v. Ogden	13, 15, 17
Gilman v. Philadelphia, 3 Wall. 713	9
Glenn v. So. Exp. Co., 170 N. C. 286	9
Hall v. DeCuir, 95 U. S. 485	14, 20, 24, 43
Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465	9
Harris v. People, 64 N. Y. 148	69, 70, 71
Henderson v. New York, 92 U. S. 259	9
Hendricks v. Block, 80 Ark. 333	9
Keller v. United States, 213 U. S. 138	9
Kidd v. Pearson, 128 U. S. 1	13

	PAGE
Lambert v. People, 9 Cowan 578	76
License Cases, 5 How. 504	9
Loney, In re, 134 U. S. 372	43
Martin v. Hunter's Lessee, 1 Wheat. 304	30
Martin v. U. S., 168 Fed. Rep. 498	76
McGuier v. C. B. & Q. R. Co., 131 Ia. 340	9
Messenger's Merchants Lunch Room, Inc., In re, 85 F. (2d) 1002	60, 61
Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412	24
National Prohibition Cases, 253 U. S. 350	28
N. Y. C. & H. R. R. Co. v. Board, 227 U. S. 248	14, 18, 19
Panama Ref. Co. v. Ryan, 293 U. S. 388	38
Passenger Cases, 7 How. 283, 399	15, 33
Patterson v. Kentucky, 97 U. S. 501	9
People v. Buchalter et al.	42
People v. Corbalis, 178 N. Y. 516	76
People v. Gould, 347 Ill. 298, 179 N. E. 848	60, 62
People v. Kane, 161 N. Y. 380	76
People v. Silverman et al., 253 App. Div. 683; aff'd 278 N. Y. 670	39
People v. Zambounis, 251 N. Y. 94	76
Platt v. New York, 232 U. S. 35	14
Rosen v. U. S., 161 U. S. 29	69, 71, 73, 75, 76
St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265	14
St. Louis, I. M. & S. R. Co. v. Starbird, 243 U. S. 592	14
Sherlock v. Alling, 93 U. S. 99	13
Slaughter House Cases, 16 Wall. 395	27
State v. Fitzpatrick, 16 R. I. 54	9
State v. Schlenker, 112 Ia. 642	9
Stowe v. Ryan, 135 Ore. 371, 296 Pac. 857	60, 61

PAGE

United States v. Cooper Corp., 312 U. S. 600 62
United States v. Furlong, 5 Wheat. 184 33
United States v. Gramlich, 19 Fed. Supp. 422 ..... 7, 8
United States v. McClone, 19 Fed. Supp. 285 7
United States v. Reichert, 32 Fed. Rep. 142 ..... 77, 78

STATUTES

Anti-Racketeering Act—Secs. 420-a to 420-e of Title 18, U. S. C. A. 2, 54, 56

Constitution of Louisiana 21

Constitution of the United States:
Article I, Sec. 8 9
Article III, Sec. 3 40
Article IV, Sec. 4 10
Fifth Amendment 63
Sixth Amendment 63
Tenth Amendment 9
Eighteenth Amendment 15, 27, 28, 29, 30

Clayton Act, Sec. 6 ..... 57, 58

Senate Report 1440, 73rd Cong., 2d Session 50

Senate Resolution 74 6

Sherman Act 1, 2

U. S. Code, Title 18, Sec. 412 32

TEXTS

1 Wheaton, International Law (1929), 274 35

Willoughby, Constitutional Law, Sec. 69 ..... 16, 20

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BRIEF FOR THE PETITIONERS

Statement

Petitioners, a labor union and some of its officers and members, were convicted in the District Court for the Southern District of New York on two indictments, one under the Sherman Act and one under the so-called Anti-Racketeering Act. The Circuit Court of Appeals for the Second Circuit reversed the convictions under both indictments, but did not dismiss the indictments. The reversal of the conviction under the Sherman Act was unanimous. The reversal under the Anti-Racketeering Act was by a divided Court. One of the judges (A. N. Hand, J.) dissented; and the majority did not quite agree in their interpretation of the Act, each writing a separate opinion. The opinions are reported in 118 Fed. (2d) 684 *et seq.* Neither side is seeking review of the decision of the Circuit Court of Appeals in the case under the Sherman Act. Peti-

tioners herein seek to review so much of the decision of the Circuit Court of Appeals as failed to dismiss the indictment under the Anti-Racketeering Act.

The indictments were returned on May 31, 1938, and were demurred to by petitioners. Argument on the demurrers was heard by Judge Leibell and overruled. In overruling the demurrers Judge Leibell rendered one opinion, which is printed in the Record at pages 77-98. The appeal to the Circuit Court of Appeals included an appeal from the order overruling the demurrer, and the ruling is sought to be reviewed in this Court.

The Indictments

The indictment under the Sherman Act was in one count, alleging conspiracy to restrain trade in violation of Section 1 of that Act. The indictment under the Anti-Racketeering Act contains four counts, each charging conspiracy. The four counts of the Anti-Racketeering indictment charge the same conspiracy, which is the same as that charged under the Sherman Act. This conspiracy, according to the allegations of the indictments, commenced on December 1, 1936, and continued "up to and including the date of the filing" of the two indictments.

The Statute

The so-called Anti-Racketeering Act now constitutes Sections 420-a to 420-e of Title 18, U. S. C. A. The material portions of that statute are as follows:

> "Sec. 420-a. INTERFERENCE WITH TRADE AND COMMERCE BY VIOLENCE, THREATS, ETC.; PENALTIES.
>
> Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts, shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

Sec. 420-b. * * *

(b) The terms 'property', 'money', or 'valuable considerations' used in section 420a of this title shall not be deemed to include wages paid by a bona fide employer to a bona fide employee.

* * * * * *

Sec. 420-d. SAME; JURISDICTION OF OFFENSES.

Any person charged with violating section 420a of this title may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided*, That no court of the United States shall construe or apply any of the provisions of sections 420a to 420e of this title in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."

The Demurrer

The points raised on the demurrer, the overruling of which is sought to be reviewed here are:

1. That the indictment does not charge a conspiracy to commit any specific act made criminal by the statute under which the indictment was found.

2. That the indictment does not allege any overt act.

3. That the indictment does not allege or show that the defendants or the matters complained of are not within the exceptions contained in the Act.

The Facts

The Government's claim as to the facts which constitute the alleged conspiracy may be summarized as follows:

That Local 807, the labor-union defendant, established and sought to enforce a rule whereby only its members could drive trucks (in the particular branch of the trucking industry over which it claimed jurisdiction) *within the City of New York;* and that the individual defendants used violence or threats thereof in seeking the enforcement of that rule. In so doing, it is claimed, they compelled truck owners from outside the State of New York to turn over the trucks, as soon as they came within the limits of the City of New York, to members of Local 807, and pay them $9.42 for each large truck and $8.41 for each small truck,—that being the union daily wage for driving these respective classes of trucks. The Government's version of the facts was thus stated by the United States Attorney in his opening to the jury:

> "The indictment further charges that by reason of this abuse by the defendant Local 807 these drivers who brought the trucks into the city were compelled themselves to stay idle while the trucks were here be-

cause of the demand of this local *that their men exclusively be allowed to drive these interstate trucks while they were within the city.* * * *

* * * Our proof will have to do with interference by violence, with threats to commerce by union men of this New York City Local 807, to union men of the same international union but from locals in other states, and with the damage and loss to our trade and commerce incident to that interference and *with the insistence by this New York local*, notwithstanding the fact that these interstate trucks were in many instances being driven by union men, *that those trucks be driven in the City of New York only by members of Local 807*, and that those other drivers, union men themselves, would have to step down, turn over their trucks, *and be idle in order to allow the 807 men to drive those trucks within the City of New York*" (Record, fols. 523, 530).

The History of the Legislation and the Judicial History of the Act

The Anti-Racketeering Act (Act of June 18, 1934) was adopted by Congress practically without debate, as part of a "Legislative Program" prepared by a Committee of the United States Senate headed by the late Senator Copeland of New York, as the result of an agitation that the Federal Government "do something" about an alleged "crime wave" which is supposed to have swept the country because of the activities of organized "gangsters and racketeers" who were using the facilities of interstate communications as a means of accomplishing their crimes. It was claimed in support of Federal intervention that because of the interstate ramifications of the criminal organizations involved, and the perfected means of interstate communication and transportation used by these criminal organizations, the states were not in a position to cope with their activities; and that for the same reason their

activities came within the purview of the powers granted to the Federal Government by the Constitution of the United States. There were also some who desired the Federal Government to have the general power to suppress crimes of violence, and they advocated an amendment to the Constitution which would give the Federal Government *concurrent powers* with those of the states to deal with such crimes.

As a result of this agitation, Senator Copeland introduced a resolution in the United States Senate on May 8, 1933, which became known as Senate Resolution 74 of the Seventy-Third Congress, First Session, calling for an investigation of the subject. The resolution was adopted and in pursuance thereof Senator Copeland was appointed chairman of a subcommittee of three of the Committee on Commerce of the United States Senate, with powers to investigate the subject. This Committee, which became known as the Copeland Committee or Anti-Crime Committee, held hearings in various parts of the country during the latter part of 1933 and the early part of 1934. As a result of those hearings and the deliberations of the committee, its chairman, Senator Copeland, made "an oral report" to the Senate on behalf of the committee, in a speech delivered by him on January 11, 1934, outlining a "Legislative Program", at the conclusion of which he introduced some thirteen bills, one of which became the Act here in question.

The proceedings at the hearings of this senatorial subcommittee were published as an official document; and a part thereof, summarizing the hearings held in the City of New York and in Detroit, together with some other materials relating to the subject, have been printed by us in a booklet entitled, "Materials on the Anti-Racketeering Act", which was used in the Circuit Court of Appeals and which we intend to submit to this Court for its convenience, when the case is called for argument.

As far as we were able to ascertain, there were only three prosecutions under the Anti-Racketeering Act up to the time when this case was argued in the Circuit Court of Appeals, and only one conviction,—that in the present case. The other two prosecutions were also against labor union activities or connected therewith; and only one of them involved anything that might conceivably be called "racketeering",—the case of *United States* v. *McGlone* (19 Fed. Supp. 285), in which it was claimed that a labor union leader and his attorney received $5,000 in connection with the settlement of a strike. That case ended in an acquittal. The other case, that of *United States* v. *Gramlich* (19 Fed. Sup. 422), was based on alleged violence used in furtherance of a jurisdictional dispute between two labor unions. That indictment was dismissed, we are informed, on motion of the United States, for the reason that the defendants had been indicted and prosecuted for the same acts under the Sherman Act. Prior to its dismissal, the indictment was demurred to by the defendants, and the above citation is to a report of the decision of the District Court overruling the demurrer.

ARGUMENT

POINT I

The Anti-Racketeering Act is unconstitutional.

We respectfully submit that the Anti-Racketeering Act is unconstitutional, generally, as in excess of the power granted to Congress by the Constitution. And particularly, if it be construed and applied in the manner in which it was construed and applied in this case in the courts below. We believe that those courts have misconstrued the Act, and that if properly construed it would not apply to the case at bar. The question of the constitutionality of the Act in general may, therefore, become a problem of severability under the severability clause of the Act itself and the general principles applicable to such cases. In the case of *United States* v. *Gramlich* (19 Fed. Supp. 422), the Court, on demurrer, held that the words "in any way or in any degree" in the introductory sentence of the first section of the Act may be disregarded, and the Act construed as if it read "substantially affecting trade or commerce". We seriously doubt whether a court has the right to disregard any language in a criminal statute in order to save its constitutionality. In that respect, we believe, criminal statutes are different from those dealing with pure problems of regulation. However, this question need not detain us here, since the result of such discussion would not affect the case at bar. As construed and applied in this case the Act is clearly unconstitutional. And that not only because the courts below apparently proceeded upon the theory that the words which the court in the *Gramlich* case said must be disregarded in order to save the constitutionality of the Act, were actually an integral part of the same, but also because there are equally cogent, if not more serious, objections to the Act, which the Court in the *Gramlich* case did not consider because they had not been raised.

A. The Federal Government has no general police powers under the Constitution, and it is specifically deprived of the power to protect the community against violence, that being left entirely to the States.

It is elementary that the Federal Government has not been granted any general police powers by the Constitution, and that those powers were specifically reserved to the States by the Tenth Amendment.

License Cases, 5 How. 504;
Gilman v. *Philadelphia*, 3 Wall. 713;
Henderson v. *New York*, 92 U. S. 259;
Hannibal & St. J. R. Co. v. *Husen*, 95 U. S. 465;
Boston Beer Co. v. *Massachusetts*, 97 U. S. 25;
Patterson v. *Kentucky*, 97 U. S. 501;
Keller v. *United States*, 213 U. S. 138;
State v. *Schlenker*, 112 Ia. 642;
McGuier v. *C. B. & Q. R. Co.*, 131 Ia. 340;
State v. *Fitzpatrick*, 16 R. I. 54;
Hendricks v. *Block*, 80 Ark. 333;
Glenn v. *So. Exp. Co.*, 170 N. C. 286.

But this is not all. We are not dealing here with a case where the reservation to the States under the Tenth Amendment results from the fact that the power was not expressly granted to the Federal Government. The reservation to the States is not an implied one, but an express one. The subject of crime and violence is treated in the Constitution,—and it is treated in a way *to deprive* the Federal Government of the power to deal with the subject, under well-known canons of constitutional interpretation and statutory construction. Article I, Section 8, which contains the grant of legislative power to Congress, contains two paragraphs expressly dealing with the subject, in addition to others which deal with it by implication. These specific provisions are as follows:

"To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

"To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

These provisions, we respectfully submit, are *express limitations* upon the power of Congress to deal with the subject of crime,—limiting that power to offenses committed on the high seas and offenses directed against the Government of the United States as such.

Then there is the additional provision in Section 3 of Article III, dealing with the subject of treason, which says:

"The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

This, we respectfully submit, is not merely a limitation on the manner of punishment of the crime of treason. The specific grant of power is, under familiar rules, a limitation upon the *general* power to deal with the subject of crime. And, as must be noticed here again, the reason for the grant of power is that the offense is one directed against the Government of the United States as such. The scheme of division of constitutional powers is thus clear: *Congress has no power to deal with crime generally;* and the only exceptions permitted are those which are offenses against the Government itself or those committed on the high seas, which properly belong within the power of the Federal Government, since they are not within the power of the States, and the States could not exercise them properly under the scheme of government provided by the Constitution. And if that were not enough, there is the specific provision dealing with the subject of *violence*, as distinguished from crime generally, in Section 4 of Article IV, which reads:

"The United States shall guarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

It will thus be seen that, aside from the general provisions which deprive the Federal Government of the right to deal with crime generally, there is a special provision—with a carefully provided double-check,—which deprives it of the right to deal with the subject of *violence*. Not only can the Federal Government meddle with that subject only upon the request of the State involved, but the request must come from the Legislature of the State, and only when the Legislature is not in session may it be done upon the request of the Executive of the State. That indicates the great care which the framers of the Constitution took to guard against the interference of the Federal Government in the domestic affairs of the States under the pretext,—or in the mistaken belief,—that it was necessary for the purpose of the suppression of crime or the protection of the citizens of the State against violence.

That does not mean, of course, that Congress may not deal with crime incidentally,—as an incident of the exercise of some power expressly granted to it. But it does mean that the exercise of such power may not be made a pretext for dealing with crime generally. And also that the subject of *violence* is in a class by itself,—so that while the Federal Government may deal with certain crimes either for its own protection or in order to facilitate the exercise of the powers granted it by the Constitution, *it cannot deal with the subject of violence even in such cases*, for that has been expressly withdrawn from its competency.*

We do not need to enter here into the much-mooted question as to whether or not Congress may use powers expressly granted to it, in order to accomplish general purposes of social amelioration, such as is involved in the Child Labor Cases. What we do say, is, that whatever may be the correct answer to that question, such an answer could not possibly give the Government the right to deal

* Except, of course, to suppress insurrections and punish treason,—both involving acts of violence directed against its very existence, and both covered by special grants.

with the subject of *violence*, which is not only reserved to the States, but especially guarded against invasion or circumvention by special provisions of the Constitution.

B. The right to regulate interstate commerce is exclusive in the Federal Government.

Passing the question as to whether or not the Federal Government could under the guise of regulating interstate commerce usurp the power of protecting the citizens of the States against crimes of violence or extortion, *there is even a more serious question of what would happen to the States if the Federal Government assumed that power.*

In this connection, we respectfully call the attention of the Court to the fact that the Committee of the Federal Bar Association of the Second Circuit, and all others who have dealt seriously with the problem, were of the opinion that an amendment to the Constitution would be necessary in order to permit the Federal Government to enact the kind of legislation with which we are dealing here. Some favored such a radical change in our governmental structure, and some opposed it (Hearings, pp. 7-36; Materials, pp. 4-11). But aside from the question whether such a step would be wise or otherwise, all agreed that that would present a very serious problem of co-ordinating the Federal power with the powers of the States to deal with the same subject; since no one would want to deprive the States of the power to deal with the subject as it would be tantamount to abolishing the States. Those who suggested a constitutional amendment, therefore provided for concurrent jurisdiction, with proper protection against double jeopardy (Hearings, p. 59; Materials, pp. 34-35). We shall have to deal with this subject of concurrent jurisdiction further below. What we are concerned with here, is, that no one would venture to suggest that the subject involved in the Anti-Racketeering Act could be legislated on by Congress directly. The Act under consideration was therefore enacted by Congress under the guise of a

regulation of interstate commerce. *But that has certain necessary and inescapable consequences, because of the fact that the power of Congress to regulate interstate commerce is exclusive.*

That the power of Congress to regulate interstate and foreign commerce is exclusive is a principle too well established in our law to require elaborate discussion. That much was settled in *Gibbons* v. *Ogden;* and the later cases emphasized the principle and extended its field of operation:

Sherlock v. *Alling*, 93 U. S. 99;
Bowman v. *C. & N. Ry. Co.*, 125 U. S. 465;
Kidd v. *Pearson*, 128 U. S. 1.

C. Whenever the Federal power to regulate steps in, the police power of the State steps out.

Notwithstanding the numerous decisions of this Court on the subject, there still seems to be confusion in the minds of some members of the profession as to just what the exclusiveness of the power of Congress to regulate interstate commerce means. This confusion is due to two circumstances: First, to the fact that interstate and intra-state commerce are mingled in the course of ordinary business. And, second, to the fact that this Court has held that the police power of the States applies even to interstate commerce until the ground has been occupied by the Federal Government. But while the rules developed by our courts in this field are sometimes difficult of application, the rules themselves, as well as the theory of government underlying them, are perfectly clear. And upon careful examination it will be found that they fit in with our general scheme of government which provides: on the one hand, for a strict separation of powers between State and Nation; and, on the other, for the *superiority* of the National Government over the State Governments whenever and wherever it acts constitutionally.

In the application of the general principles upon which our Government is founded, it will be found upon a careful examination, that there is as strict a division of power between our two governments as there is between any two sovereign powers; and that *the two never occupy the same ground at the same time.*

It is true that the division is functional and not personal or geographical; but the division itself is as strict and rigorous as that of the geographical division between two independent sovereign powers. The States, it is true, are not "sovereign" in the same sense as independent sovereigns, but the only consequence of that is that *whenever and wherever the Federal Government steps in the States step out.*

Hall v. *DeCuir*, 95 U. S. 485;
Chicago, R. I. & P. R. Co. v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426;
Adams Express Co. v. *Croninger*, 226 U. S. 491;
Chicago, St. P., M. & O. R. Co. v. *Latta*, 226 U. S. 519;
N. Y. C. & H. R. R. Co. v. *Board*, 227 U. S. 248;
St. Louis, I. M. & S. R. Co. v. *Edwards*, 227 U. S. 265;
Barrett v. *New York*, 232 U. S. 14;
Platt v. *New York*, 232 U. S. 35;
Atchison, T. & S. F. R. Co. v. *Robinson*, 233 U. S. 173;
Atchison, T. & S. F. R. Co. v. *Moore*, 233 U. S. 182;
Missouri, K. & T. R. Co. v. *Harris*, 234 U. S. 412;
Atchison, T. & S. F. R. Co. v. *Harold*, 241 U. S. 371;
St. Louis, I. M. & S. R. Co. v. *Starbird*, 243 U. S. 592.

D. There is no room for the exercise of concurrent power by both the Federal and State Governments.

It follows from the foregoing that there can be no exercise of power by both Governments *concurrently*. Indeed, the current notion with respect to concurrent powers is one of the greatest fallacies in the domain of our Constitutional Law. This concurrency existed for a short time, in a special field, due to special circumstances which are now

happily passed and which therefore need not detain us here. Under our Constitutional scheme as it has always existed, except for a short period under the provisions of the Eighteenth Amendment, and as it now exists, there is neither room nor possibility for a concurrent exercise of power of the two Governments. And this is as true of the regulation of commerce as of any other sphere of Government. This was tersely stated by Mr. Justice McLean in his opinion in the *Passenger Cases*. Said he:

> "*A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action.* It involves a moral and physical impossibility."
>
> *Passenger Cases*, 7 How. 283, 399.

Mr. Justice McLean's statement, made nearly one hundred years ago in one of the most famous cases in our legal history, has never been questioned as a principle, even though it was never again stated as succinctly or as pungently. That it is recognized now even more than when it was first announced,—or rather formulated, for it was accepted as far back as Marshall's great opinion in *Gibbons v. Ogden*,—is shown by the fact that it is quoted with approval by Professor Willoughby in his *Constitutional Law*, the latest authoritative work on the subject, and adopted by him as the correct exposition of the basic principle of Constitutional Government in the United States. This principle is thus expounded by our latest authoritative text writer in the domain of constitutional law:

> "*Exclusive and Concurrent Powers.*
>
> "The legislative powers possessed by the Federal Government may be divided into two classes: the one embracing those powers the exercise of which is exclusively vested in the Federal Government; the other those which, in default of Federal exercise, may be employed by the States. * * *

> "In view of the fact that as to these so-called concurrent powers, State law must always yield to Federal law, *when one exists*, it is perhaps unfortunate that the term 'concurrent' should have come into use, since the word indicates an equality of jurisdiction which does not exist."
>
> *Willoughby, Constitutional Law*, Sec. 69 (2d Ed., Vol. 1, p. 112).

And on the specific subject of interstate commerce, Professor Willoughby says:

> "Though often spoken of as a matter of concurrent jurisdiction, this authority of the States to legislate with reference to matters primarily of local concern, but which incidentally affect interstate commerce, is not in fact a concurrent jurisdiction as to interstate commerce. Laws passed in pursuance of this jurisdiction derive their authority solely from the powers constitutionally reserved to the States, and *the moment they relate directly to interstate commerce they become unconstitutional and void*" (*Ib.*, p. 115).

E. The States have no power to legislate in any field occupied by the Federal Government, no matter what the source of authority or the nature of the power exercised.

As may be seen from the passage quoted above from Professor Willoughby's authoritative work, and as must also follow from a consideration of the principle involved, there can be no concurrent exercise of power over the same subject no matter what the governmental power involved may be, or the source from which it flows. When, therefore, the Federal Government exercises its power to regulate interstate commerce, it occupies the entire field so that the States have no room left for action at all or for the exercise of any power whatsoever. And the police power is no exception: it must yield like any other power.

Indeed, the principle stated by Professor Willoughby can have no other meaning than the complete supersession of all State powers, for the States have no power to regulate interstate commerce. The only power the States can

exercise at all with respect to matters involving interstate commerce is the general police power, which includes the power to punish crime and prevent violence. It is the exercise of these powers that *becomes unconstitutional*, according to Professor Willoughby, when the Federal Government decides to occupy the field. The reason is obvious; and, as already stated, has been stated in numerous cases since the decision in *Gibbons* v. *Ogden*. It is this: *The exercise of any power by the States in the premises is deemed to interfere with the power of Congress to regulate, and cannot therefore be tolerated when the Federal Government has jurisdiction.*

In order, therefore, to preserve for the States as large a competency over local matters as possible, the courts have developed what may be called the *Doctrine of Toleration*,—according to which action of the States, *not intended to regulate commerce*, but merely to prevent crime and violence, or to protect health, is tolerated when it relates to interstate commerce, on the theory that the Federal Government is willing to have the States exercise those functions rather than that it should do so itself, even in those respects in which it is competent to do so. But the moment the Federal Government, through Congressional legislation, has acted with respect to a particular field or function, that *toleration* ceases, and another doctrine comes into play,—*the Doctrine of the Freedom of Commerce*. The relation of the two doctrines is this: In all matters relating to commerce, the doctrine of Freedom of Commerce prevails, and lack of action by Congress is deemed proof that Congress wanted commerce to remain *free* from *any* regulation. But where the purpose of the action is not to regulate commerce but to provide for protection of life, health, and property, the State power will prevail until the Federal power has actually been exercised. Once, however, that power has actually been exerted *in any manner whatsoever*, the State power is ousted from the field, so that any action on the part of the States becomes an interference with the regulatory power of Congress.

The principle involved, and the extent of the ouster power implicit in the manifestation of a congressional intention to assert *any* power of the subject, is best illustrated by the case of *N. Y. Cent. & H. R. R. Co., supra.* The case involved the right of Hudson County, New Jersey, to prescribe the price of ferriage between that county and New York City on a ferry operated by an interstate railroad in connection with its road,—not, however, for the railroad passengers but for those who used the ferry only. In order to understand the full significance of the case, it should be stated that this Court had previously decided that ferriage between States is a local matter, and may be regulated by the States. In the opinion deciding that in *this* case the State of New Jersey was *ousted* by Congress, this Court said:

> "It follows that to dispose of the case we are called upon only, following the ruling in the Gloucester Ferry Case, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the state of *vicarious* and *revocable* authority over the subject
> * * *
>
> "But as all business of the ferries between the two states was interstate commerce within the power of Congress to control, and subject in any event to regulation by the state as long only as no action was taken by Congress, *the result of the action by Congress leaves the subject*, that is, the interstate commerce carried on by means of the ferries, *free from control by the state.* We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit.
>
> *In the absence of an express exclusion* of some of the elements of interstate commerce entering into the ferriage, *the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested.* Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its au-

thority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the power of Congress and the power of the states over a matter of interstate commerce, is *inconceivable*, since the *exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate*. To concede that the right of a state to regulate interstate ferriage exists 'only in the absence of Federal legislation', and at the same time to assert that the state and Federal power over such subject is *concurrent, is a contradiction in terms.*"

N. Y. C. & H. R. R.R. Co. v. Board, 227 U. S. 248, 263, 264.

F. The Federal Government may regulate such portions of intra-state commerce as may affect interstate commerce; and when it does the principles applicable to interstate commerce are applicable to the intra-state commerce in question, and the States are ousted from the field thus occupied by the Federal Government.

We respectfully submit further, that all the principles applicable to interstate commerce, including the doctrines of *Freedom* and *Toleration*, are applicable to such portions of intra-state commerce as *affect* interstate commerce, and are therefore within the legislative competency of Congress. With this difference, however: *Intra-state* commerce being primarily within the constitutional competency of the States, the doctrine of Freedom of Commerce is merged into the doctrine of Toleration, and therefore does not come into play unless and until Congress has, by some action, indicated that the commerce in question although intra-state *affects* interstate commerce so as to bring it within its constitutional power. The situation is thus reversed from that which exists in the field of interstate commerce, to the extent that not all regulatory action on the part of Congress necessarily spells *freedom* for that

commerce, since the State has the power to regulate and it is for it to say, primarily, whether that commerce should be free or bound. But when Congress has by a constitutional exercise of power definitely manifested an intention to regulate in any particular any part of intra-state commerce, that commerce is taken out of the competency of the States with respect to the matter covered by Federal regulation as effectually as if it were interstate commerce.

Congress having said, for instance, that the crimes of extortion and violence either in interstate commerce or in intra-state commerce affect interstate commerce to such an extent as to require action on its part, that puts a definite end to the power of the States to deal with the subject,—assuming, of course, that Congress had acted constitutionally,—and all action on the part of the States in this field becomes an interference with the power of the Federal Government to regulate interstate commerce. This is of necessity so, since otherwise Congress would not have the constitutional power to act in the matter at all,—the constitutional basis of its power being the assumption that such exercise of power is necessary to the regulation of commerce. And since the control of crime and violence is thus determined to be necessary for the proper regulation of interstate commerce, the exercise of the same power by the States becomes *intolerable*. *The power of the Federal Government to oust the State Governments from the field is co-extensive with its power to regulate.* The principle is thus stated by Professor Willoughby:

> "There is thus, as to *intra*state commerce, and to this extent, a concurrent jurisdiction which, as in other instances when exercised by the Federal Government, *supersedes that which may have* been exercised by the States" (*Ib.*, p. 115).

But while the basis of the Federal power is regulation, the supersession is complete. This is well illustrated by the case of *Hall* v. *DeCuir*, *supra*.

In that case an anti-Jim Crow statute of Louisiana was held unconstitutional, and a constitutional provision of that State upon which the statute was based practically nullified, because of alleged interference with interstate commerce, even though the constitutional provision as well as the statute were intended to protect *civil rights*, and were not intended as regulations of commerce.

The Constitution of Louisiana provided that:

> "All persons shall enjoy equal rights and privileges upon any conveyance of a public character."

In pursuance to that constitutional provision, the Legislature of the State passed an act which provided as follows:

> "Section 1. All persons engaged *within this State*, in the business of common carriers of passengers, shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats, or other watercraft, stagecoaches, omnibuses, or other vehicles, or to expel any person therefrom after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known: *Provided*, Said rules and regulations make no discrimination on account of race or color; and shall have the right to refuse any person admission to such conveyance where there is not room or suitable accommodations; and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyance or to expel therefrom any person whomsoever. * * *
>
> "Section 4. For a violation of any of the provisions of the first and second sections of this Act, the party injured shall have a right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction."

Mrs. DeCuir, a Negro, was refused equal accommodation on a steamboat owned by the defendant company,—the company having a Jim Crow rule whereby Negroes were segregated from Whites. Mrs. DeCuir desired to travel within the State of Louisiana only. But the boat went further and into Mississippi. Because of that, this Court held that the statute in question was an interference with interstate commerce and void. In a unanimous opinion delivered by Chief Justice Waite, this Court said:

> "The District Court of the parish held that the statute made it imperative upon Benson to admit Mrs. De Cuir to the privileges of the cabin for white persons, and that it was not a regulation of commerce among the States and, therefore, not void. • • •
>
> "For the purposes of this case, we must treat the statute, as requiring those engaged in interstate commerce to give all persons traveling in Louisiana, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that Act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States.
>
> "There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'Legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution'. • • •
>
> "The same is true of turnpikes and ferries. By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control except when employed in foreign or interstate commerce. As they

can only be used in the State, their regulation for all purposes may properly be assumed by the State, *until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside the State as it comes within the State.* * * *

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to *interfere* directly *with its freedom* does encroach upon the exclusive power of Congress. * * * While it purports only to control the carrier when engaged within the State, it must necessarily *influence his conduct to some extent* in the management of his business throughout his entire voyage. * * *

"It was to meet just such a case that the commercial clause in the Constitution was adopted. * * *

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by *Mr. Justice* Field, speaking for the court in *Welton* v. *Missouri*, 91 U. S. 282, 'Inaction (by Congress) * * * is equivalent to a declaration that interstate commerce shall be free and untrammeled.' Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage *within Louisiana* or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State Court, seeks to take away from him that power *so long as he is within Louisiana;* and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we

statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. *If the public good requires such legislation, it must come from Congress and not from the States.*"

Hall v. DeCuir, 95 U. S. 485, 486-490.

C. The Federal Government may not under the guise of regulating commerce deprive the States of powers expressly reserved to them.

The foregoing considerations inevitably lead to the conclusion that the Act here under consideration is unconstitutional, because it deprives the States of the power expressly reserved to them to deal with crime and violence. In this respect there is a great difference between the problem of regulation as such and the problem of regulation by means of the assumption of power to punish crime and prevent violence. In the former case we have to deal with a *residuary* power as far as the States are concerned,—the residue being there because of certain language used in the Constitution in the grant of power to the Federal Government. In such a case, when the language of the Constitution is expanded so as to narrow the residue, there is no conflict with any other provision of the Constitution. But we are on an entirely different plane when we attempt to expand the meaning of a grant of power to the Federal Government in such a way as to trench upon a power *expressly* reserved by the Constitution to the States.

Nor is this merely a question of theory. As a practical matter the problems ordinarily involved in regulation are such that the two governments may adjust themselves each to the other,—usually the inferior States to the superior Federal Government. But it is quite a different matter when we enter the domain of criminal law with its traditional and constitutional safeguards of the liberty of the citizen. Whatever may be the rule either as a matter of strict American constitutional law or as comity in the

Law of Nations,—which is supposed to be part of our legal system,—as to the right of one government to accord to another government a power which it would not otherwise possess, there can be no such rule with regard to the respective rights of our two governments to punish the citizen. *The citizen has something to say about that.* And certainly, the citizen would not consent to be punished by both governments, or to permit both governments to have the right to punish him. Nor can the citizen be put in a position where he would not know what the law is by which he is governed.

Again we respectfully call the attention of the Court to the fact that the functional division between our two governments is as strict and rigorous as is the geographical division between two ordinary sovereignties, and that there may be no "twilight zone" over which both may have jurisdiction. Indeed, if a "twilight zone" is created in the domain of criminal law it will be found that neither Government will have jurisdiction, and that instead of spreading out a wide net in which to catch a particularly desperate class of criminals, we have stretched the net so wide that it will snap and permit the criminals to escape altogether. That is a danger which must be borne in mind in considering both the constitutionality and the construction of the Act.

In this connection we desire to call the attention of the Court to the fact that the difference between the problem of regulation and that of protection against crime and violence, is basic for another reason. While it is generally assumed, and this Court has stated, that the States are as supreme with respect to the regulation of intra-state commerce as the Federal Government is with respect to interstate commerce, there is in fact no provision in the Constitution which puts the regulation of intra-state commerce within the power of the states. *Intra*-state commerce is nowhere referred to in the Constitution. That does not mean, of course, that therefore it is not within the com-

petency of the States, or that the States are not as fully competent to deal with such commerce where it exists, as the Federal Government is to deal with interstate and foreign commerce. But it does mean this: That in the course of our economic progress intra-state commerce may disappear completely, and the competency of the State over *any* commerce with it, without in any way affecting our governmental structure. We cannot say definitely that such a possible course of economic evolution was actually envisioned by the Framers. But we may say with confidence that if they did not envision that possibility, then they builded better than they knew in the choice of language that they actually made. Not that the use of the word intra-state would have necessarily kept that commerce alive and within the competence of the States if economic evolution should decree otherwise. But it is rather fortunate that the expression "intra-state commerce" is not in the Constitution for obstructionists to hang on to when the national importance of intra-state commerce shall have disappeared.

But we are dealing with an entirely different matter when we discuss the competency of the States to deal with crime and violence. *Not only is that competency specifically and most emphatically provided for in the Constitution, but our entire Federal system is based upon it.*

POINT II

If the Anti-Racketeering Act is constitutional the States have forever been deprived of the power to deal with the crimes of extortion and violence.

As will be seen further below, we believe that Congress intended to pass a piece of legislation which would be constitutional and which would make no fundamental change in the existing distribution of powers between the States and the Nation with respect to the control of crime. Whether

it succeeded in doing so is another question. Clearly, it has not succeeded in doing so if the Act be construed and applied as it was construed and applied in this case by the courts below. In reviewing the action of the courts below, this Court must therefore squarely face the alternatives presented. For there is no escaping the conclusion that if the decision under review be right, a revolution has been effected by act of Congress such as this Court said had not been accomplished by the adoption of the Fourteenth Amendment.

See, *Slaughter House Cases*, 16 Wall. 395.

A. "Concurrent Power" is a delusion, and if it were not a delusion it would create a situation such as no free people would tolerate.

We respectfully submit that, as already pointed out, the notion of concurrent jurisdiction is a delusion. But it is also a snare, since it led some over-zealous crime-investigating agencies and individuals,—in a temporary situation which made otherwise sane people speak of the declaration of martial law by the Federal Government in order to permit that Government to take the suppression of crime out of the hands of the States,*—to advocate a law which would put the power of punishing crime into the hands of both the Federal and State Governments *concurrently*, so that both might be doing it at the same time.

The prevailing confusion on the subject is due to the situation which existed under the Eighteenth Amendment.

A careful examination of the subject will disclose two things: First, that the Prohibition Amendment had, while it lasted, effected a revolution in our governmental system; but, second, that that revolution was limited to cases coming within that Amendment and did not affect the rest of our governmental structure. As a result, the temporary anomaly which existed within the sphere of Prohibition disappeared with the repeal of that Amendment. Now

* See Hearings, pp. 52-66; Material, pp. 12-15.

that that episode is, fortunately, part of our past, it ought to be forgotten as far as the anomaly which it created in our legal institutions is concerned. It certainly has no further effect upon our law, and the cases decided under it are as if they had never been. *Spurloss Versenkt*,—to use a term which became popular on the eve of Prohibition.

> "Though it has been recognized," said Professor Dowling in 1922, "that this amendment marked *a new departure* in the relationship of the state and federal governments in the enforcement of law, and though the amendment has been before the United States Supreme Court, many of the inferior federal courts, and the courts of almost half the states, there has come from the first-named court no pronouncement of the positive meaning of *concurrent power*, nor have the other courts, federal and state, disclosed a clear and definite agreement in that regard. In fact a justice of the United States Supreme Court has declared that 'it is impossible now to say with fair certainty what construction should be given to the eighteenth amendment,' and that 'because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution' in that court." *

The experience under the Prohibition Amendment during the ten years or more which elapsed from the time Professor Dowling wrote the above and the repeal of the Eighteenth Amendment has not been such as to make the people of the United States pine for its repetition. But we must bear in mind the fact which is frequently overlooked, that, after all, the Prohibition Amendment, even while it was with us, played a comparatively unimportant part in the general life of the country,—even though it managed to spread corruption and disorder into adjoining spheres of government as well as of our social life generally. But if the constitutional novelty which the Eighteenth Amendment introduced were to be applied to our

* Noel T. Dowling, Concurrent Power under the Eighteenth Amendment, Minn. Law Rev., May, 1922. The quotation by Prof. Dowling is from Mr. Justice McReynolds' concurring opinion in the *National Prohibition Cases*, 253 U. S. 350.

entire governmental system, the situation would be intolerable. Fortunately there never really was such a danger, for Prohibition was in a class by itself,—not only as to subject-matter, but *constitutionally speaking*. In this connection it must be borne in mind that the Eighteenth Amendment *was not a grant of power either to the Federal Government or the States to legislate, in the ordinary meaning of that term.*

When Mr. Justice McLean said in 1849 that a concurrent power in two distinct sovereignties involves a moral and physical impossibility, he was speaking of the division of power under our constitutional system, which leaves each sovereignty free to legislate on the subject as it chooses. But such was not the situation under the Eighteenth Amendment. *The Eighteenth Amendment did not give both Congress and the States the power to freely legislate with respect to Prohibition.* That amendment was not a grant of power to legislate,—*it was itself legislation.* The Constitution *itself* prohibited the manufacture and sale of intoxicating liquors. That is why the Amendment putting that piece of legislation into the Constitution was known as the Prohibition Amendment. And Section 2 of the Eighteenth Amendment only gave both the Federal Government and the States the power to *enforce* this piece of constitutional legislation.

That did not make it more palatable, nor did it prevent a whole swarm of incidental mischiefs to our system of government. But the Eighteenth Amendment did not enact the moral and theoretical impossibility of which Mr. Justice McLean spoke. The Eighteenth Amendment did not give both the Federal Government and the States the right to legislate on the subject in any way they wanted to. *Neither* Congress *nor* the States had the power to *permit* or to countenance either the manufacture or the sale of intoxicating liquors. Those had been legislated against by the Constitution; and all that was left to the States was to prescribe means of enforcement. That is at least a theo-

retical possibility, much as it may be a practical difficulty. And the only way this difficulty was actually removed was by this Court holding that the general superiority given by the Constitution to the Federal Government applied even to the *enforcement* provisions of the Eighteenth Amendment, even though the two governments were apparently put on a basis of equality with respect to prohibition. The fact is, that equality is a physical impossibility even in situations where it is not a moral impossibility. This Court therefore had to step in and make the Federal Government superior to the States even with respect to this narrow business of *enforcement*, in order to make the Eighteenth Amendment workable. Whatever may have been thought at one time by speculative philosophers on the subject, in practice concurrent power was found to be impossible under our system of government. The obituary of concurrent power was, in fact, written as early as 1816 by Mr. Justice Story in *Martin v. Hunter's Lessee*, 1 Wheat. 304.

B. Congress clearly intended to occupy the ground and make the Federal Act exclusive in the field to which it applies.

An examination of the Act in connection with its history and the previous legislation of Congress in this field conclusively demonstrates that Congress believed itself to be legislating on a matter within the exclusive jurisdiction of the Federal Government; and that the Act was intended to cover the entire ground to the exclusion of the States. The history of the legislation will have to be touched upon again further below, when we come to discuss what Congress had intended to cover. We shall therefore not discuss it here. But we desire to point out that whatever ground Congress intended to cover, it intended to cover *entire*, so as to exclude State action of any kind whatsoever. This, as already pointed out, would follow from the fact that this is an act regula ing commerce; unless, indeed, Congress had indicated in some way that it intended to continue *to tolerate* State action notwithstanding its own

action. We need not discuss here the question whether such *toleration* is permissible in legislation dealing with crime. For it is clear that Congress had not intended to reserve to the States any rights which they theretofore had in the premises, or to tolerate the use of any power which they had theretofore been accustomed to exercise in this field.

Legislation in the nature of control of crime under the guise of regulation of commerce is a comparative novelty in our constitutional law. The first federal law intended to deal with crime in interstate commerce was, as far as we can discover, the Act of February 13, 1913, making larceny of goods moving in Interstate Commerce a federal offense under certain circumstances. And the only other federal law that we know of declaring an act criminal *per se*, a federal offense when committed in interstate commerce, is the Act of October 15, 1914, making embezzlement by an officer of a common-carrier in interstate commerce a federal offense. There was, of course, prior to that certain federal legislation declaring certain acts in interstate commerce federal offenses, such as the so-called Mann Act. But that Act did not deal with crime but rather with a moral offense, and it related to the *use* of instrumentalities of interstate commerce for immoral purposes, rather than to offenses committed *in* interstate commerce. The same is true of the later so-called "Lindbergh Law" and the "National Stolen Property Act". A comparison of those acts with the two acts dealing with crime *in* interstate commerce, will show a basic difference,—namely, that those which prohibit the *use of the instrumentalities of interstate commerce* for immoral or criminal purposes are intended to be exclusively federal offenses, while the two acts dealing with the commission of crime *in* interstate commerce are made concurrent offenses with the State offenses which such acts constitute. The reason is obvious: The *use* of the instrumentalities of interstate commerce for immoral or criminal purposes is not and cannot be made a State crime. But a

crime committed *in* interstate commerce is a crime like any other crime, coming within the jurisdiction of the State in which it is committed. *Provision for concurrency is therefore necessary to save State jurisdiction.*

We need not discuss here the question as to whether or not the express provision reserving to the States their jurisdiction in the two acts dealing with crime in interstate commerce saves either their constitutionality or the State jurisdiction. All we are concerned with here is to point out that when Congress intended to deal with matters over which the States have jurisdiction it expressly reserved the competency of the States to deal with the subjects. And having provided for that, *it also provided against double jeopardy.* The language in this respect is identical in both acts; and, as it now stands in the U. S. Code, reads as follows:

> "Nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts."
>
> U. S. Code, Title 18, Sec. 412.

In other words, whenever Congress intended to deal with crime *in* interstate commerce, as distinguished from the use of the instrumentalities of interstate commerce for criminal purposes, it expressly reserved the power of the States to deal with the crime and at the same time provided against the double jeopardy which might result from such concurrent jurisdiction.

No such provisions are contained in the present Act.

This, we respectfully submit, clearly shows that Congress believed that it was dealing with a matter over which it had exclusive jurisdiction, and an intent on the part of Congress to so legislate as to exclude State action of any kind.

C. Exclusive jurisdiction would follow from our constitutional provisions embodying a universal principle of the civilized world; and a contrary intention of Congress would render the Act unconstitutional.

The intention of Congress to make its legislation on the subject exclusive, thereby shutting out all State legislation as "interference" with its constitutional powers to regulate interstate commerce, is clear. But it is equally clear that had Congress intended to do otherwise, that alone would have rendered the Act unconstitutional, as violative to the constitutional guarantee against double jeopardy. That protection against double jeopardy is a fundamental right of personal liberty guaranteed by the United States Constitution, is beyond question. Nor is this constitutional guarantee a unique one, as some of our other constitutional guarantees are. On the contrary, the provision against double jeopardy in our federal and state constitutions are merely enactments of the general law of the civilized world. It is in fact a part of the Law of Nations,—which is part of our legal system and would operate even in the absence of specific constitutional provisions. That much was decided by this Court as far back as 1820 in the famous *Pirate Cases*.

United States v. *Furlong*, 5 Wheat. 184.

That case definitely decided that our Constitution embodies the principle of the Law of Nations against double jeopardy; and that where there is concurrent jurisdiction there must be a provision against double jeopardy in order to render the law constitutional. But it decided more than that,—it also decided, in advance of Mr. Justice McLean's opinion in the *Passenger Cases*, that there can *be no concurrent jurisdiction by different sovereignties on the same subject matter.*

As stated by Mr. Justice Johnson, speaking for the Court, the concurrent jurisdiction of all nations which exists with respect to crimes committed on the high seas, and not on a ship flying the flag of a particular nation, is due to the

fact that no nation can claim exclusive jurisdiction of the high seas. And as other cases of this class decided in this Court clearly show, concurrence of jurisdiction, whether between nations or between our own Nation and our own States, ceases whenever any sovereign can claim jurisdiction for itself as its own right. The right claimed by any nation to repress piracy is not claimed as a right which that nation has by itself but rather as one which it shares in common with all others on the basis of equality; and in repressing it it acts on behalf of all. Hence, also, the protection against double jeopardy which the exercise by one nation carries with it as against punishment by another nation in such cases. Independent nations act on the basis of *real equality*, and the assumption of jurisdiction by one excludes all others, both with respect to the right to inflict punishment, and in the protection which punishment by one carries against punishment by others. But the United States does not bear the same relation to the States of our Union that it bears to other nations. *There is no equality between the United States and the States.* Wherever the United States is competent to act its sovereignty is *superior* to that of the States. *And that applies equally to cases which are concededly within the exclusive jurisdiction of the Federal Government as well as to those in which the jurisdiction is allegedly concurrent*, as witness the cases under the Eighteenth Amendment.

It is the working out of this principle of superiority on the part of the United States with respect to the individual States that has given rise to the false notion that the principle of double jeopardy does not apply with respect to the Federal and State Governments, and that a person may be convicted for the same offense under the laws of both Governments. Such a situation, were it true, would be repugnant to all notions of justice, whether under the Law of Nations or under our constitutional system. Fortunately, this notion is as fallacious as the entire notion of concurrent jurisdiction. It is true that a conviction in a state court cannot usually be pleaded as a bar in a federal

court, but that is due to the fact that the Federal Government cannot have jurisdiction without that jurisdiction being superior and exclusive. Jurisdiction having been found to be in the federal courts, a plea of former jeopardy must be bad because the state court could not have had jurisdiction, and the proceedings in that court must therefore, in point of law, have been *coram non judice*.

In this connection it must be borne in mind that the rule of double jeopardy is merely a branch of the law of *res judicata* reduced to a constitutional principle because of its importance in connection with individual liberty. But it rests on the same principle,—namely, that the court whose judgment is pleaded in bar to further trial had jurisdiction to adjudicate. If the court which rendered the judgment pleaded in bar had no jurisdiction, the plea is not a good plea either in a civil or a criminal case. The true rule and the reason therefor, are correctly stated in Wheaton's International Law; and both apply equally, though only one-sidedly because of the absence of time equality between our States and the Union. Says Mr. Wheaton:

> "A criminal sentence pronounced under the municipal law of one State can have no direct legal effect in another. * * *
>
> "But a valid sentence, whether of conviction or acquittal, pronounced in one State, may have certain indirect and collateral effects in other States. If pronounced under the municipal law in the State where the supposed crime was committed, or to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar (exceptio rei judicatae) to a prosecution in any other State. If pronounced in another foreign State than that where the offense is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity, and of no avail to protect him against prosecution in any other State having jurisdiction over the offence."
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> 1 *Wheaton, International Law*, (1929) 274-5.

That is the reason why in reserving the concurrent jurisdiction of the States, Congress found it necessary in the two statutes referred to, to provide against the double jeopardy which might result. Obviously, the failure to provide against double jeopardy in our Act was due lack of concurrent jurisdiction in the States. Otherwise this failure would render the Act unconstitutional.

D. In the absence of any constitutional or constitutionally valid Congressional provision for concurrent jurisdiction, the state courts can have no jurisdiction in any case in which the federal courts have jurisdiction.

The proposition here contended for is well illustrated by an early case of considerable fame decided in the courts of the State of New York. In that case a steamboat plying on the Hudson River burned with loss of life, due to an explosion caused by the manner in which it was handled, which was claimed to be in violation of federal as well as state law. The two laws were different and carried different penalties. When arrested by the state authorities, the defendants sued out a writ of *habeas corpus* claiming that the federal courts had jurisdiction, and that such jurisdiction deprived the state courts of their jurisdiction. Famous counsel argued the case, and a great judge decided it. All concerned considered it as axiomatic that if the federal courts had jurisdiction the state courts had none. The prosecution sought to avoid the consequences of this basic principle by claiming that the offense charged against the defendants in the state courts was a different one from that defined by the federal statute. The Court brushed this argument aside in a very careful opinion which laid down the fundamental rule,—namely, that it is not the name of the offense but the *act* involved that matters in such an inquiry, and that if the *act* is punishable in the federal courts the state courts have no jurisdiction. Said the Court:

> "I begin by saying that I cannot recognize the distinction taken by one of the counsel, that because Con-

gress has not made the offense which its statute aimed at, murder, but only manslaughter, therefore the State tribunals are at liberty to take cognizance of the matter if the State laws elevate the crime to that grade. That would be making the punishment, and not the offense, the standard of jurisdiction, and would permit the state authorities, by increasing the penalty, to obtain jurisdiction over offenses clearly cognizable only by the federal courts.

"*It is the nature and quality of the act, and not the extent of the penalty or punishment, which is to be the measure of the jurisdiction.*"

Burning of the Henry Clay, 2 Edm. Sel. Cas., 324, 342.

And of the basic principle involved the Court said:

"It is well settled that until Congress does exercise its power over a subject properly within its jurisdiction, the previously existing authority of the State to act upon the same subject is unaffected. It is only necessary to refer in illustration to the question of State insolvent laws, determined in Sturges vs. Crowninshield. (4 Wheat. 182.)

"But whether, in all cases when Congress does take cognizance of a subject, it is to the exclusion of all State authority on it, is another question, and not perhaps quite so well settled.

"The rule is very well stated by the Supreme Court of this State, in the case of The United States v. Lathrop (17 Johns, R. 9). There it is said: 'The jurisdiction of the State Courts is in no instance excluded where they had a pre-existing jurisdiction, except in those cases of a national character, such as admiralty and maritime matters, and suits against embassadors and other public ministers, consuls, etc., *but the jurisdiction of the State courts is excluded in cases of crimes and offenses cognizable under the authority of the United States*, and in suits for penalties and forfeitures incurred under the laws of the United States.'" (*Ib.*, 343-344.)

There are other points which may be urged against the constitutionality of the Act, which we cannot argue here

for lack of space. But we desire at least to mention one of them; namely, the delegation of power involved in the definition of "wrongful", and to refer the Court in this connection to

Panama Ref. Co. v. *Ryan*, 293 U. S. 388.

POINT III

The construction placed upon the Act by the courts below is fraught with such danger to our entire governmental system that Congress cannot possibly be held to have intended such consequences even if it had the constitutional power to do so.

A. If this law is constitutional and means what the courts below held it to mean, all racketeers, large and small, must be tried in the federal courts, and none may be tried by the state courts.

We believe that Congress had no power to accomplish the results which would follow a holding that the Anti-Racketeering Act as construed and applied in this case is constitutional. And it is equally clear that Congress intended no such results. In fact, it is clear that the results which must necessarily follow a holding that the Anti-Racketeering Act was properly construed and applied in this case, would be the exact reverse of what those who sponsored the Act had intended to accomplish. For it is clear that no one had intended to deprive the States of their power to deal with the crimes involved, and that law enforcement as a whole would lose more than it would gain by the transfer of the power from the States to the Federal Government. This is best illustrated by what has actually been done in this field since the enactment of the Anti-Racketeering Act by the Federal Government as compared with what has been done by the State Governments. Notwithstanding the hysteria of some of those who appeared at the hearings held by the Senatorial Sub Committee in-

vestigating the subject, over the alleged breakdown of law enforcement by the States, and the fanfare with which this particular piece of legislation was introduced, the actual accomplishments of the Act to date are exactly *nil*,—in so far as the prosecution of actual racketeers is concerned. Not only was not a single racketeer put behind the bars under this so-called Anti-Racketeering Act, but no real racketeer has ever been prosecuted under it. On the other hand, staying right here within the limits of the Southern District of New York, in which the present prosecution was had, and within the very industry involved in this case, there have been some notable achievements under State law,—*all of which would have been impossible if this Act meant what the courts below said it meant. Such prosecutions by the States will become impossible if that construction is upheld by this Court.*

It appears that two officers of Local 138,—a sister-local of Local 807 within the International Brotherhood of Teamsters, operating in New York City,—were engaged in a real racketeering activity in conjunction with the notorious industrial racketeer known as "Lepke". This resulted in two prosecutions, both conducted in New York County, under two different State statutes, covering two different phases of this class of activities. One of these statutes makes a certain phase of such activities a misdemeanor, and the other statute makes another phase a felony. The union officers were tried first under the misdemeanor statute, and were duly convicted and the convictions duly affirmed by the Appellate Division and the Court of Appeals.

People v. *Silverman et al.*, 253 App. Div. 683; aff'd 278 N. Y. 670.

Following the conviction on the misdemeanor charge, these union officials were indicted with Lepke and two of his associates under the felony statute,—for different acts, of course,—and the trial was had almost concurrently with the trial in this case. The two union officials pleaded guilty,

and presumably helped the Government in the prosecution of the real racketeers. The latter were convicted on numerous counts (charging substantive offenses, not conspiracies). Lepke was sentenced to imprisonment for not less than thirty years nor more than life on each of the many counts on which he was convicted; and his two associates to shorter terms. This case is now in the appellate courts. And, we respectfully submit, *the conviction in that case would have to be reversed if the conviction in this case was proper.*

Needless to say, neither the sponsor of this legislation in proposing it, nor Congress in enacting it, intended such a result. And it is equally clear that neither the sponsors of this legislation nor Congress intended that any but the so-called "big shot" racketeers should be tried in the federal courts.

Senator Copeland, who piloted this legislation through Congress, in the report in which he introduced the bill which finally became the Act under consideration, said:

> "A friend of mine in New York owned a store and decided that he would use it for the sale of automobile accessories. To this end he put a magnificent plate-glass front in his store, really a showcase. When he unveiled it a young man entered his store and said, 'You have a beautiful plate-glass front. You should join the Plate Glass Protective Association.' My friend said, 'What is that?' He said, 'We patrol the streets and guard the property of our members.' 'How much does it cost?' 'Fifteen dollars a week.'
>
> "My friend said; 'Why, I cannot pay $15 a week to have my plate glass protected. I will depend upon the insurance companies.' 'All right,' said the walking delegate. He left the store; and the next morning my friend came down and found his plate glass smashed. He collected his insurance, replaced it, and had the same experience over again; and then he could not get any more insurance.
>
> "Then what did he do? He paid tribute of $15 a week to this scallawag organization in order that he might do business and preserve his property and display his goods in this plate-glass showcase.

"That is a local racket. I am not bringing it to you with any idea that that can be prevented or controlled or regulated by any sort of Federal legislation. I could name you 150 such rackets, including the laundry racket.

"If you have a hotel, a man comes in and says, 'We want to do your laundry.' 'We do not want to change. We are satisfied.' 'All right.' The next time the laundry goes out, with these magnificent linen sheets and pillowcases, and towels, and so forth, they put acid on the linen and destroy it, and ultimately force the hotel man to hire that particular laundry."

(Cong. Rec., p. 451; Materials, pp. 48-49.)

Senator Copeland is dead, but his associates who sponsored this legislation are alive. We take it that they would be very much surprised if they were to find that the racketeers carrying on the "local rackets" could not be prosecuted under the laws of the State of New York if it should turn out that the stores he mentioned dealt in imported goods, or if instead of stores the local racket concerned warehouses in which goods in interstate or foreign commerce were stored. But such would be the case if the words, "in any way or in any degree", are to be given effect. And such would also probably be the case in the hotel-laundry racket in New York, if the laundry happened to be done on the other side of the Hudson River; and possibly in any event, since anything that affects a hotel in New York City affects interstate commerce in some way.

But whatever may be thought of the small rackets mentioned by Senator Copeland, it is clear that if the views of the courts below be correct, the New York State courts had no jurisdiction to try the big racketeer Lepke for the big racket conducted by him,—for that involved interstate commerce in a big way.

That racket involved the flour-trucking and baking industries. It was a real racket,—that is to say, Lepke and associates ran a "protective association" of which flour-trucking houses and owners of baking establishments were required

to be "members". The racket was operated in the exact manner described by those who sponsored this legislation at the hearings conducted by the Senatorial Sub-Committee investigating the subject with respect to so-called "industrial rackets". The "Big Money" came from the members of the association, who were paying "dues" and other moneys for alleged "protection" offered them by the "association". Its "labor"-end consisted of a couple of union officials, who were taking orders from the racketeers,—the orders usually being to call a strike of the drivers of such flour-trucking houses or baking establishments as were unwilling to buy "protection". The money involved was really big,—it was counted in thousands and tens of thousands at a time, and not in petty sums of $8.41 and $9.42. And the interstate commerce involved was practically all the flour that came into New York City and all the bakery products that went out of New York City. Needless to say, the flour came in interstate commerce from the West, and the products of the larger bakeries at least went west across the Hudson River and north into New England. And all the big flour-trucking houses and most of the large bakery establishments were made victims of the racket. The sums of money were large because the interstate business involved was large. The first witness called for the prosecution testified that his firm alone trucked some *25,000 barrels per week.*

People v. *Buchalter et al.*, Record on Appeal, fols. 337-568. (Materials, pp. 75-85.)

If the punishment of the crime of extortion committed in connection with interstate commerce is within the constitutional power of the Federal Government, and that crime is embraced in the Act here under consideration, then clearly the courts of the State of New York have no jurisdiction over the crime for which Lepke and associates were convicted in the case just cited. Lepke and associates were therefore improperly convicted, and they are entitled

to have their convictions reversed. Furthermore, under the decisions of this Court they would be entitled to be released on *habeas corpus* no matter what happened to their appeals in the State courts.

In re Loney, 134 U. S. 372.

This result, startling as it may be, we respectfully submit, is the necessary consequence of this ill-advised piece of legislation,—assuming that it was correctly construed and applied in the courts below. For it must be remembered that the courts are not concerned with consequences once the meaning of the Act has been judicially established and the Act as so construed held constitutional. It was no argument, for instance, in the *DeCuir* case that Congress could not possibly have intended by its *non*-action, that the State of Louisiana should be deprived of the right of enforcing the civil-rights provisions of its constitution on vessels plying a river within its borders, because they also happened to go beyond its borders, even to a case of local-passenger traffic within the State. Law has its own logic. And anyone who joins in the making of a law or passes judicially on its meaning must be ready to take all the consequences implicit in the action.

B. As at present construed this Act must throw both our legal systems into utter confusion.

Nor are the consequences of this Act as presented above the worst of the situation. After all, the people of the United States may, in time, adjust themselves to the notion that the States have lost the power of dealing with extortion and violence,—at least as far as the "Big Operators" in this line of "business" are concerned. And our federal Department of Justice may realize in time that it is its duty to go after these Big Operators, for whose especial benefit the Anti-Racketeering Act was passed, and not to use it against labor-unions exclusively. But that would not be the end of the difficulty by any means. For we must

bear in mind the 150 "local rackets" referred to by Senator Copeland. Not being a lawyer, Senator Copeland apparently thought that it was a simple matter to distinguish between a local racket and a national one. Those who are familiar with the subject know, however, that if this statute be held to apply to extortion and violence *in* interstate commerce, instead of only to cases in which the instrumentalities of interstate commerce are used as a means of operating the racket, every prosecution under the Act in the federal courts will resolve itself into a long-drawn-out battle over the question how much interstate commerce is involved. And in many cases, when the battle is over, it may be discovered on appeal, that, after all, interstate commerce was not involved and the prosecution futile.

But the major difficulty would be in the administration of the criminal law in the state courts. It is safe to say, that if this Act means what the courts below said it means, every trial in the state courts for extortion or involving violence or the threat thereof, will resolve itself into a long drawn-out contest as to whether or not the state court had been ousted of jurisdiction because of the fact that the crime "affected",—even if we forget "in any way or any manner"—interstate commerce. For it must be borne in mind that in criminal cases we cannot resort to the expedient which the Legislature of the State of New York resorted to in enacting the New York State Labor Relations Act, by providing that the State Labor Board should relinquish jurisdiction whenever the employer claimed that he was subject to the jurisdiction of the National Labor Relations Board. A person charged with crime has a right to stand mute, and he cannot be asked to say whether he wants to be tried in the federal courts or in the state courts. Unless we should abandon not only the present distribution of powers in our constitutional system, but also all our notions of the rights of the individual charged with crime, we cannot escape clogging up the judicial machinery in all our courts, federal as well as state. For, as already pointed

out, everyone convicted of crime in a state court has the right to test the jurisdiction of the state courts, on *habeas corpus*, in the federal courts. In order to escape the wrecking of our criminal law administration we would therefore also have to abolish the writ of *habeas corpus*.

We stated before that the courts are not concerned with the question, whether or not the law-maker had intended certain consequences, once the meaning of a law has been judicially established. But in attempting to ascertain that meaning, the Court construing it must, for that very reason, inquire into the consequences which would flow from possible alternative constructions, and to reject such constructions as would be attended by consequences which the law-giver could not have, or was not likely to have, intended. That neither the sponsors nor Congress could have intended the consequences of the construction placed upon this Act in the courts below would be presumed even if there were no specific evidence to that effect. But the evidence on the point is clear and explicit,—writ large in the report of the hearing before the Senatorial Committee, in the Congressional Record, and Senate and House committee reports.

(See, Materials, and sources there indicated.)

POINT IV

If the constitutionality of the Act is to be saved it must be given the meaning of the law which Congress had intended to enact.

As already stated, we doubt whether this Court has the power to disregard any of the language used in the Act in order to save its constitutionality. But it is clear that if its constitutionality is to be saved, the Act must be given the meaning of the law which Congress had *intended to enact*. That Congress had not intended to enact the kind of law that was applied in this case in the courts below

is apparent from every word said by the sponsors of this Act, as well as from the remainder of the Legislative Program of which this Act was a part,—all of which, we respectfully submit, must be taken into consideration if we are to get at the real intention of Congress.

A. The Act under consideration was part of a Legislative Program which must be considered in its entirety.

We respectfully submit that we cannot possibly get at the full intention of Congress in enacting the Anti-Racketeering Act if we consider it as an isolated enactment. It was not such historically. And being historically part of a comprehensive Legislative Program, the principle of *noscitur a sociis* applies to the entire Act, as it would apply to parts of an Act or words used therein. For, *noscitur a sociis* is not a technical rule, but a rule of cognition, and must be used wherever it may be of use. And when we read the Act in that light we shall find that it means,—or at least *was intended to mean*,—something utterly different from the law which was applied in the courts below.

B. The history of the Legislative Program.

Before, however, discussing the Legislative Program of which the Act here under consideration was a part, we must take a brief glance at the history of that Program. That history,—or at least its official part,—consists of the report of the hearings held by the Senatorial Sub-Committee on Crime and Racketeering; the verbal report made by its Chairman to the Senate in introducing the Legislative Program; and the various reports on the different bills constituting that Program. A portion of that history,—sufficient we believe to give a precise picture,—is contained in the "Materials" which we intend to submit to the Court with these briefs. An examination of that history will establish the following propositions:

First,—that no one wanted to transfer the prosecution of all "racketeering" to the Federal Government.

Second,—that those who wanted a general law, wide enough to catch all "racketeers" but intended to be used only against the "big shots",—which is the only kind of racketeers the sponsors of this legislation were gunning for,—realized that that could only be accomplished by a constitutional amendment. This they accordingly proposed, and it contained a provision *for* concurrent power and *against* double jeopardy.

Third,—that the sponsors of the Legislative Program, properly so called, intended a legislation within the present constitutional frame and directed exclusively against crime *organized and operated on a large scale* by means of interstate action or communication. In short,—the Legislative Program was designed to meet the evil of *organized, professional, and national rackets,—national not only because of their ramifications but also because of the means used in running them.*

All three elements were and are necessary elements of the class or kind of crime which the Legislative Program was designed to combat. And that applies to every Act which constitutes a part of that Legislative Program. The hearings made it clear that the evil discussed, and the Legislative Program intended to be formulated, had not only a certain class of crime but also a *certain class of criminal* in view,—*the hardened professional criminal who operates with the use of firearms and who could not operate without their use.* The discussion at these hearings bristled with war and army terms. We have already referred to the fact that some of the participants advocated the declaration of martial law by the Federal Government as the only way in which the "war" upon the criminals they had in mind could be successfully conducted. "This is war" was the constantly recurring refrain not only of those who advocated martial law but also of some of those who advocated a Legislative Program within the frame-work of our peace-time constitutional arrangements. Time and again the

Senatorial Sub-Committee was assured, and members of the Sub-Committee itself stated their conviction to be, that an essential element of the Program,—indeed, the pivot upon which the whole must turn,—was a law controlling interstate traffic in firearms. And it is interesting to note that while it was not finally included in the Legislative Program, a suggestion was made that the manufacture and sale of machine guns ought to be entirely prohibited, since they were of no particular use to the United States Army but were used by the army which this Legislative Program was intended to fight.

But it was not only a certain kind of criminal that those who formulated this Legislative Program had in mind; they also had in mind a special kind of crime,—*crime organized on an interstate basis*. In this connection it is interesting to note that next to firearms the emphasis was laid on the means which the "army" of criminals habitually used in carrying on its criminal business,—namely, *fast automobiles and airplanes*. As pictured by the sponsors of this legislation the crime to be fought always has interstate ramifications, *and always uses interstate means of transportation*.

And as a combination of the two,—the vast interstate organization of the criminals involved, and the means used by them in doing their nefarious work,—there was the resultant picture, constantly dwelt on by the sponsors of this legislation, of great masses of wealth accumulated by the criminals against whom the legislation was directed. Wealth which enabled them to acquire the best and fastest automobiles and airplanes.

C. The Legislative Program.

As a result of the hearings conducted by the Sub-Committee of the Senate Committee on Interstate Commerce, its Chairman, Senator Copeland, presented an oral report to the Senate on January 11, 1934, in which he gave a general account of the hearings conducted by the Sub-

Committee and the matters developed thereat, and he closed by the presentation of the Legislative Program. This Program consisted of thirteen bills (Cong. Rec., 73rd Cong., 2d Session, pp. 448-452, 457-459. Materials, pp. 45-59).

The first of these bills was an amendment to the Packers and Stockyards Act of 1921, so as to include poultry in interstate commerce. This was apparently designed as a means of giving the Secretary of Agriculture such control over the poultry business as would enable him to deal with the so-called "poultry racket" which had been before the courts, and was referred to during the hearings. The next bill was one to amend the statute of June 15, 1917, so as to extend in certain directions the war-time statute intended to prevent sabotage in our foreign exports.

These two statutes were amendatory of old laws, intended to serve certain special purposes. The general Legislative Program begins with the third bill of the series, which finally became the Act here under consideration. This was followed by a bill dealing with extortion *by means of* the interstate use of the telephone, telegraph and radio. Then came a bill "to punish the transportation of securities in interstate or foreign commerce." Then came a bill "to extend the provisions of the National Motor Vehicle Theft Act," so as to convert it into a "National Stolen Property Act." Then came a bill "to amend the act forbidding the transportation of kidnapped persons in interstate commerce." Then came a bill "making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution or the giving of testimony." These bills were followed by four dealing with procedure in the federal courts. And the Program concluded with an elaborate measure for the control of interstate traffic in firearms.

It will thus be seen that the Program, insofar as it dealt with crime, consisted of two parts: one, dealing with procedure in the federal courts, and the other dealing with

substantive crimes in which instrumentalities of interstate commerce are used as a means of accomplishing the crime.

We respectfully submit that our Act must be assimilated to all the other acts which are neither regulatory nor procedural, and that it was the intention of Congress in enacting this Act to provide punishment for those extraordinary cases of organized interstate crime which had been discussed at such length at the hearings,—namely, where airplanes and fast automobiles are used in connection with the crime either in bringing the criminals to the scene of their operations or as a means of dispersal to various States, so as to make action by the States difficult if not impossible. That, we respectfully submit, is the proper construction to be given to this Act under the doctrine of *noscitur a sociis*. And it is the only construction which can save this statute from the taint of unconstitutionality.

That that was the kind of crime which those who devised this Legislative Program had in mind is also clear from the final report made by the Senatorial Sub-Committee, after this Legislative Program, including our Act, had been adopted. In that report the Chairman of the Senate Sub-Committee in charge of the legislation said:

> "Since my report on January 11, there have been introduced some 92 additional bills all designed to close the gaps in existing Federal laws and to render more difficult *the activities of predatory criminal gangs of the Kelly and Dillinger types*"
>
> (Senate Report 1440, 73rd Cong., 2d Session. Materials, p. 60.)

Those who recall the accounts of the gangs in question, or who have read the accounts of the operations of those gangs as given at the hearings conducted by the Senatorial Sub-Committee, will recall that the *operations* of those gangs were *interstate*, in the sense that interstate transportation was used in their operations *as means* of accomplishing their crimes.

D. The Anti-Racketeering Act had the same purpose as the entire Legislative Program of which it was a part, and must be construed to cover a crime of similar legal import.

We respectfully submit, that, under the rule known variously as *noscitur a sociis* or *ejusdem generis*, the Act under consideration must be construed as defining a crime similar in character to that of the other laws proposed and adopted simultaneously with it as part of the same legislative program. As so construed it does not cover any crime committed *in* interstate commerce; but rather crimes in which interstate commerce was in some way *used* as *a means* of accomplishing the crime.

What the sponsors of the bill, and particularly Congress in enacting the Act, intended, was, clearly, to apply the principle of the National Motor Vehicle Theft Law,—now transformed into the National Stolen Property Act, as part of this Program,—in reverse, so to say. The National Stolen Property Act makes it a federal crime to use interstate commerce *after* the commission of the crime itself for the purpose of carrying away the *corpus delicti* from the scene of the crime to better hide it or dispose of it. And our Act was intended to make it a federal offense to use interstate commerce for the purpose of carrying the criminal to the scene of the crime or away from it for the purpose of facilitating the commission of the crime or the escape of the criminal from the State in which the crime was committed, with or without the booty. Possibly also to cover such use as a means of communication between the criminals, situated in various States in planning the crime.

E. The Act was intended to apply only to crimes of a certain magnitude.

But it must also be so construed as to apply to the class of crimes which both the history and the tenor of the Legislative Program indicate the law-giver had in mind, insofar as national import is concerned. In addition to the requirement that instrumentalities of interstate com-

merce be used in its accomplishment, the crime must belong to the class or kind of crimes which *usually require* the use of such instrumentalities in their accomplishment because of their magnitude and interstate ramifications. That such was the purpose of the sponsors of this legislation, and of Congress in enacting the Act, was repeatedly stated at the hearings conducted by the Senatorial Sub-Committee and in the discussions in and reports to Congress. But in addition thereto there is inherent proof in the bill submitted and in the Act as enacted that such was the intention of Congress.

Limiting ourselves to the bill and Act alone, it will be found that the bill as originally proposed was different from any other piece of legislation ever enacted by Congress or any other Legislature, as far as we know. Wherever the crime defined is not capital, there is usually a provision for a maximum penalty, which is sometimes accompanied by provision for a maximum fine. Sometimes there is also a minimum provided for, either with respect to the fine, or the imprisonment, or both. The Act here under consideration is of the second variety as far as the provision for imprisonment is concerned, but it departs from all precedent by providing a flat fine of $10,000. Nor was this departure from precedent a matter of accident. The reason is to be found in the kind of crime the legislator had in mind, and the kind of criminal against whom the legislation was directed.

This becomes clearer when we look at the bill as originally proposed. Under the provisions of the original bill, the culprit was to be punished by "imprisonment from 1 to 99 years, and, in addition, by a fine which shall be at least commensurate with the amount of the unlawful gain." Three things deserve attention in this remarkable provision for punishment: First, the extraordinary period of maximum imprisonment of ninety-nine years. Second, the *compulsory* imposition of a fine. And, third, the extraordinary provision with respect to the fine, which does not set any maximum, but which provides a minimum indi-

cating that the law contemplated large "gains" as a result of the crime. *Nota bene:* not the amount extorted or obtained from the victim but "the amount of the unlawful gain." What the sponsors of the legislation had in mind, was, clearly, not a particular act of violence, but a regularly *organized business in which violence was used as the means of doing business.* That is exactly the kind of crime that those who participated in the hearings were talking about. That is the crime which the Senatorial Committee intended to cover by its Legislative Program.

And that is the crime which Congress had in mind in enacting this particular piece of legislation. For, it should be noted that this is not merely the form of the bill as proposed, but of the law as passed by the Senate and as reported to the House by its Judiciary Committee. The change was made in the House, by an amendment offered on the floor of the House, presumably by someone who was worried that the unique provision for fine might endanger its constitutionality. He might also have thought that ninety-nine years would deter juries from convicting. So the term of imprisonment was reduced to a reasonable number of years,—*reasonable*, that is, for the kind of crime which Congress had in mind,—and the fine was made a definite sum. But the sum provided for in the Act as it stands still indicates that Congress was dealing *with crime as a business, and a very lucrative business at that.* This, also, is in accord with the statements made at the hearings conducted by the Senatorial Sub-Committee as to the "gains" reaped by those who are in the business *of organized crime* in its industrial form. For it must be remembered that the entire investigation centered around three classes of organized crime; kidnapping, bank robberies, and industrial racketeering of the kind disclosed in the *Lepke* case discussed above.

POINT V

The Anti-Racketeering Act does not apply to the case at bar.

We respectfully submit that it is clear from the history and purpose of the legislation in question that it was not intended to cover labor disputes, and the case at bar is a labor dispute if there ever was one. An examination of the statute itself will show a very careful purpose on the part of Congress, to make sure that it would not be applied to labor disputes, or to anything relating to actual performance of labor. This is made manifest by two sets of provisions contained in the statute,—the two provisions with respect to wages, and the *proviso* expressly exempting legitimate labor union activities from the operation of the statute.

A. The dispute in this case was clearly a dispute involving wages.

Section 420-a, subdivision (a) defines the crime involved in the following language:

> "Obtains or attempts to obtain, by use of or attempt to use or threat to use force, violence or coercion, the payment of money or other valuable consideration, or the purchase or rental of property or protective service, *not including, however, the payment of wages by a bona-fide employer to a bona-fide employee.*" (Italics supplied.)

And this exemption is repeated in Section 420-b, subdivision (b), which provides that:

> "The terms 'property', 'money', or 'valuable considerations' used in Section 420-a of this title, shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee."

This, we respectfully submit, effectively disposes of the case at bar. It is undisputed that the employers involved in this case were bona fide employers. Nor is there any disputing the fact that the defendants were bona fide employees, for no one claims that the labor-union in question is not a bona fide labor-union and that its members are bona fide workers or "employees", as that term is generally used in recent Congressional legislation. In that legislation "employees" is used as synonymous with "workers", and the only reason "workers" is not used in that legislation is because of the survival in some quarters of the old notion that "workers" means manual laborers only, and our recent legislation deals with all kinds of workers, including what is commonly called "white collar workers" and even professionals. But there can be no doubt of the fact that "employees" includes manual laborers such as are involved in this case. Nor can there be any question of the fact that the membership of the individual defendants in the labor-union involved was in their capacity of workers.

Nor is there any question but that the "conspiracy" related to work to be performed by bona fide employees for bona fide employers. In this connection we respectfully call attention to the statement made by the United States Attorney in opening the case to the jury as to the nature of the conspiracy charged in the indictment. Because of its crucial importance in the case we quote it here again. He said:

> "The indictment further charges that by reason of this abuse by the defendant Local 807 these drivers who brought the trucks into the city were compelled themselves to stay idle while the trucks were here because of the demand of this local *that their men exclusively be allowed to drive these interstate trucks while they were within the city.* * * *
>
> "* * * Our proof will have to do with interference by violence, with threats to commerce by union men of this New York City Local 807, to union men of the same international union but from locals in other states, and with the damage and loss to our trade and commerce

incident to that interference and *with the insistence by this New York local*, notwithstanding the fact that these interstate trucks were in many instances being driven by union men, *that those trucks be driven in the City of New York only by members of Local 807*, and *that those other drivers, union men themselves, would* have to step down, turn over their trucks, *and be idle in order to allow the 807 men to drive those trucks within the City of New York*" (Record, fols. 523, 530).

It is, therefore, clear that the purpose of the "conspiracy" with which the defendants herein are charged, was to secure to the members of Local 807 employment which would result in the payment to them of $9.42 or $8.41 per day, which are the "moneys" which the defendants are charged with conspiring to obtain. *That the sums referred to would be wages if the purpose of the conspiracy had been accomplished is beyond question. The substantive act which the defendants conspired to commit being clearly without the statute, the "conspiracy" to commit it cannot possibly be a criminal offense.*

B. This case involves a labor dispute and is, therefore, within the proviso of the statute.

In addition to the provisions expressly excluding wages from the purview of this Act, Section 420-d contains a separate *proviso* which, we respectfully submit, excludes all labor disputes from its purview. The section is as follows:

"Sec. 420-d. *Same: jurisdiction of offenses.*

Any person charged with violating section 420a of this title may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided*, That no court of the United States shall construe or apply any of the provisions of Sections 420a to 420e of this title in such a manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."

The first thing to be noted about this *proviso* is the similarity of the language with that of Section 6 of the Clayton Act. But there are two differences; and we respectfully submit that both show an intention of further assurance, so to say, of the immunity granted by the *proviso*. The first difference is that the *proviso* is placed in the section which deals with jurisdiction,—thus indicating clearly that Congress had in mind the difficulty which had arisen over the exemption intended to be given to labor unions by the Clayton Act, which resulted in the enactment of the Norris-LaGuardia Act which made the exemption of the Clayton Act *jurisdictional*. The other difference consists in the substitution of "impair, diminish, or in any manner affect" for the "forbid or restrain" of the Clayton Act. It is clear that by this proviso Congress intended to extend to labor-unions the same exemptions from the operation of the Anti-Racketeering Act which it had extended to them from the operation of the Sherman Act by Section 6 of the Clayton Act; and that it further intended that those exemptions should be broadly construed. What Congress, in effect, said was this: In construing this Act it must be remembered that this is a Kelly-Dillinger Act, and not an anti-labor Act: It is intended to deal with a particular crime as to which there has been a great public outcry, and not with the economic problems involved in the relations between employers and employees. It must not, therefore, be used, as the Sherman Act was used, as a whip against labor-unions.

But quite aside from the special language used in order to fortify and make sure of the exemption of labor-unions from the operation of this Act, it is quite clear that even if the language were no stronger than that of Section 6 of the Clayton Act, the present case would clearly fall within the *proviso*.

Apex Hosiery Co. v. *Leader*, 310 U. S. 469.

Indeed, even before the decision of this court in the *Apex* case, there was hardly any room for argument as

to the *proviso* in this Act. As will be recalled, the argument in support of the contention that the use of force and violence excluded labor-union activities from the "immunity" granted by Section 6 of the Clayton Act, was based on the use of the word "lawfully" as a qualifying adjective in connection with the immunized activities. That argument, while unsound, had a certain amount of plausibility in view of the nature of the Sherman Act, which dealt with peaceful activities as well as activities of a different character. The contention sounded plausible that it was the intention of Congress to immunize the peaceful activities of labor-unions which come within the purview of the anti-trust laws, but not those in which violence was used as a means of accomplishing the purpose in hand. But that argument cannot possibly be used in the present case, since the present Act is itself a statute against violence, and no one can be convicted thereunder except for the use of violence or the threat thereof, nor can *any* activity be considered within the purview of the act unless it involved such use. To say that a *proviso* contained in a statute dealing exclusively with violence is nullified by the use of violence is, we respectfully submit, too absurd to require elaborate refutation.

POINT VI

The matter involved in this case was of a local nature, and did not affect interstate commerce either in its constitutional or statutory meaning.

We respectfully submit further that the matter involved in this case was not interstate commerce; nor did it "affect" interstate commerce either in the constitutional or statutory sense. We assume that the Court will disregard the words "in any way or in any degree", since those words would clearly render the statute unconstitutional, besides making it utterly unworkable. In order to save its constitutionality we must take the advice of the learned court in the *Gram-*

Lich case and substitute for those words the word "substantial". But once we have substituted that word for the actual words used, the matter involved in the case at bar immediately sheds its national character and purely local nature becomes apparent.

The Record shows that the defendants herein were engaged in an attempt to unionize the trucking industry *within the City of New York*, and that the rule promulgated by it, the enforcement of which constitutes the "conspiracy" charged in the indictment, was not directed against interstate transportation, *but was strictly limited to transportation within the City of New York.* As already pointed out, the United States Attorney himself so stated to the Jury in opening the case. It is true that in enforcing the rule in question the defendants *did not differentiate* between trucks coming from out of the State of New York or from portions within the State of New York outside of the City of New York. Indeed, they did not differentiate between trucks coming *out* of the City of New York and those operating exclusively *within* the City. *It was a local organization seeking to control the local trade.* The requirement that the driving of trucks within the City of New York be limited to its members applied to all trucking *within* the City wherever originating. And, we respectfully submit, the fact that this refusal to differentiate put trucks coming from outside of the State of New York on a *par* with trucks operating exclusively within the City of New York did not make the "conspiracy" one *against* interstate commerce. Insofar as interstate commerce was involved, it was *incidental* to the employer-employee problem *within* the City of New York.

Nor was the matter of a nature to *affect* interstate commerce in the same sense as the matters involved in cases arising under the National Labor Relations Act. In this respect, this situation is entirely different from the situation presented in *Consolidated Edison* v. *N. L. R. B.* and cases of a similar nature. As the matter is quite obvious, we shall not attempt any elaborate discussion of the point unless challenged.

POINT VII

The labor-union defendant is not a "person" within the meaning of the Act.

We respectfully submit that a mere inspection of the Act here under consideration is sufficient to compel the conclusion that the statute was intended to apply to natural persons only.

It would be a novelty, not to say a revolution, in our criminal law, if Congress or any other Legislature were to make a law like the present one applicable to unincorporated associations, such as the labor-union petitioner. But an inspection of the statute shows that Congress certainly has done no such thing. The introductory paragraph of the Act reads:

> "*Any person* who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce * * * (italics supplied).

It is well settled that in the criminal law "person" means a natural person, unless expressly otherwise stated. And we may add that we do not know of any case in which a crime involving violence has been made to apply to any but natural persons.

Indeed, "person" would be presumed to mean a natural person in any statute in the absence of special provision to the contrary, unless the nature of the law and the context in which the word is used clearly indicated the contrary,—perhaps we should say *compelled* a contrary interpretation.

In re Messenger's Merchants Lunch Room, Inc., 85 F. (2d) 1002;
Stowe v. *Ryan*, 135 Ore. 371, 296 Pac. 857;
People v. *Gould*, 347 Ill. 298, 179 N. E. 848.

In the first case cited, the Circuit Court of Appeals for the Seventh Circuit said:

> "We consider the terms 'individual' and 'person' equivalent to each other."
>
> *In re Messenger's Merchants Lunch Room, Inc.*, 85 F. (2d) 1002, 1004.

And in the second case cited, the Supreme Court of Oregon said:

> "Counsel contends that the word 'person' includes the civil service commission. We cannot follow counsel. The acts should be construed in accordance with the expressed intent of the lawmakers. *Spencer* v. *City of Portland*, 1140 v. 382, 235, P. 279. The term 'person', as used in its primary sense, means a natural person only."
>
> *Stowe* v. *Ryan*, 296 Pac. 857, 862.

The last case involved the meaning to be given to the word "person" when used in a criminal statute. The statute involved in that case, insofar as material to the present discussion, read:

> "Every person who shall falsely make, alter, forge, or counterfeit any promissory note, or any other written instrument of another, or purporting to be such, by which any pecuniary demand or obligation, or any right in any property, is, or purports to be, created, with intent to damage or defraud, shall be deemed guilty of forgery."

The defendants in that case had obtained money by the making and passing of a promissory note signed by them in the name of a fictitious person. The conviction obtained in the trial court was reversed by the Supreme Court of Illinois, on the ground that the word "person", implied in the word "another" used in the statute, meant a living person and not a fictitious being or entity. Said the Court:

"The indictment charges them with making, passing and uttering a fictitious note purporting to be the note of M. D. Tomlinson, there being then in existence no such individual as M. D. Tomlinson. *The word 'person', as used in Section 105, means a human being.* (Webster's Unabridged Dict.) Section 107 expressly applies to cases where the name of a fictitious person is signed to the note. Section 105 does not apply to cases where the name of a fictitious person is signed to the note; therefore the indictment charged no crime under Section 105."

People v. *Gould*, 347 Ill. 298, 303.

And in this case, Judge Clark, of the Circuit Court of Appeals, said in his concurring opinion (118 Fed. Rep. [2d] at p. 688):

"It is hornbook law that, absent a clear legislative intent, an unincorporated corporation does not commit crimes, 7 C. J. S., Associations, Section 17, p. 43; and Congress has often shown that it knows how to include an association as a person when it so desires, as in the Sherman and Clayton Acts, 15 U. S. C. A., Sections 7, 12, and literally a host of others, but not in the general construction law, 1 U. S. C. A., Sec. 1."

See, also, *United States* v. *Cooper Corp.*, 312 U. S. 600.

POINT VIII

The indictment offends basic principles of criminal law and violates constitutional guarantees.

We respectfully submit that the indictment, because of its *failure to allege specific acts, or a conspiracy to commit specific acts*, violates fundamental principles of criminal law, and contravenes specific guarantees contained in the Fifth and Sixth Amendments to the United States Constitution. It also violates a fundamental principle of the criminal law applicable to conspiracies by failing to allege an overt act.

The Fifth Amendment to the United States Constitution, insofar as pertinent to the present discussion, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty, or property, without due process of law."

The pertinent provision of the Sixth Amendment is as follows:

> "In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation."

We may add here that the provision just quoted from the Sixth Amendment would be part of our constitutional guarantees even if it had not been covered specifically because it is part of the "due process" requirements of the Fifth Amendment, since under the Anglo-Saxon legal system there can be no "due process" in a criminal case without the accused being informed of the "nature and cause" of the accusation, nor in a civil case without the defendant being informed of the "nature and cause" of his liability. And also that the specific provision of the Fifth Amendment against double jeopardy would also be one of our constitutional guarantees under the "due process" clause even if it had not been separately provided for. And a mere inspection of the indictment shows that it offends against all of the quoted constitutional provisions.

A. The failure to charge that the defendants conspired to obtain money from a person specifically named, fails to inform the defendants of the "nature and cause" of the accusation, and also contravenes the provision that no one shall be prosecuted without an indictment by the Grand Jury.

The charging part of the indictment is as follows:

> "Beginning on or about December 1, 1936, and continuously thereafter up to and including the date of the

> filing of this indictment * * * the defendants did * * * conspire and act concertedly with each other to obtain the payment of money and other valuable consideration from the said shippers, owners, operators and drivers of said over-the-road motor trucks and their helpers by the use of, attempt to use and threat to use force, violence and coercion in connection with and in relation to acts directly affecting interstate trade and commerce and articles and commodities moving in interstate trade and commerce" (fols. 176-178).

The "said" in the above quotation does not refer to any particular shippers, owners, operators or drivers named in an earlier part of the indictment; nor is any shipper, owner, operator or driver named in any other part of the indictment. In other words, the indictment does not state that the defendants had conspired to obtain money from any particular shipper, owner, operator or driver, but from "shippers, owners, operators and drivers" generally,—the only limitation being that the "shippers, owners, operators and drivers" were such as drove from outside the State of New York into the State of New York. Clearly, that does not charge anything, and certainly does not inform the defendants of the "nature and cause" of the accusation against them. It no more informs them of the "nature and cause" of the accusation than if it had merely said that they were charged with violating the Anti-Racketeering Act. Ordinarily, we should consider this so elementary as not to require any discussion, and that a mere quotation of the charging part of the indictment was sufficient to prove its insufficiency. In view, however, of the disposition of the case in the courts below, we shall discuss briefly the various aspects of the problem, and cite a few of the many authorities that could be cited. Before doing so, however, we desire to state what we believe to be the proper form of an indictment under this statute, and in that connection quote from the only other indictments under this Act with which we are familiar,—that in the *Gramlich* case. In that case the indictment charged that the defendants,—

"did * * * conspire and act concertedly with each other to obtain valuable considerations from the Peabody Coal Company, Valier Coal Company, Bell & Zoller Coal & Mining Company, Old Ben Coal Company (hereinafter called operators), which at all times hereinafter mentioned have been engaged in the mining and production of coal in the State of Illinois for shipments to States other than the State of Illinois by the use of and threat to use force, violence and coercion."

This indictment meets both the constitutional requirements under discussion, in that it shows that the Grand Jury had a particular act in mind when it charged the defendants with violating the statute, and it informs the defendants of the "nature and cause" of the accusation against them by telling them what they should prepare to meet at the trial. On the other hand, the indictment in the case at bar fails to comply with either of these constitutional requirements, because it not only fails to inform the defendants of the "nature and cause" of the accusation against them, but fails to state what particular crime, if any, the Grand Jury had in mind when it charged the defendants with violating the Anti-Racketeering Act. *The indictment herein is in fact no indictment at all.*

The discussion, therefore, properly begins at this point. For before the defendants in a criminal case can be informed of the "nature and cause" of the accusation against them, the Grand Jury itself must have found that "nature and cause" and so stated in the indictment. Otherwise there is no indictment. For the indictment must be in a form to enable the trial court to tell whether evidence offered by the prosecution is competent, and a reviewing court whether the defendant had been tried for the crime which the Grand Jury had in mind when it found the indictment.

In re Bain, 121 U. S. 1.

The case cited not only lays down the principle involved, which was never questioned, but it illustrates the great care

with which the courts have enforced it. In that case, an official of a national bank had been indicted for making a false report to the Comptroller of the Currency. The indictment charged that the false statements were made "with intent to deceive the *Comptroller of the Currency and* the agent appointed to examine the affairs" of the bank in question. Apparently, other portions of the indictment showed that the Comptroller himself had not seen the report and that it was the Comptroller's agent only that had been deceived. The indictment was, therefore, demurred to; and the court sustained the indictment, but permitted an amendment striking out the italicized words, as mere surplusage. After conviction the defendant sued out a writ of *habeas corpus* out of this Court, and the writ was sustained and the defendant discharged on the ground that after the elimination of the italicized words the crime charged was not the identical crime that the Grand Jury had in mind when finding the indictment, even though the Grand Jury had found that both the Comptroller and his agent had been deceived. Mr. Justice Miller, in delivering the unanimous opinion of this Court, said:

> "The learned judge who presided in the circuit court, at the time the change was made in this indictment, says that the court allowed the words 'Comptroller of the Currency and' to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its

better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. * * *

"It only remains to consider whether this change in the indictment deprives the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. *We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury.* The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. *Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney;* for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." (Italics supplied.)

In re Bain, 121 U. S. 1, 9-10, 13.

It goes without saying that an indictment which doesn't name any specific person as the person from whom the money was improperly obtained, or against whom the conspiracy to obtain money was directed, contains nothing to show what the Grand Jury had in mind when it indicted the defendants, and, after trial, there is nothing to show whether or not the defendants had been tried for the same offense as that with which the Grand Jury had charged them. Verily, in such a case, the liberty of the citizen is

entirely within the hands of the prosecuting attorney, as the following considerations clearly demonstrate:

The record shows that the Government called various witnesses to show that the defendants had threatened them as a means of obtaining money. Assuming that the evidence tended to prove a threat against those persons within the meaning of the Act, there is not the slightest way of ascertaining whether a *single one* of the alleged threats testified to at the trial were the threats of which evidence had been presented to the Grand Jury or which the Grand Jury had in mind in finding the indictment. For aught that we know, not a single one of the cases of alleged threats testified to at the trial were actually presented to the Grand Jury or found by the Grand Jury to have been a violation of the Anti-Racketeering Act.

In his opinion just quoted, Mr. Justice Miller, speaking for the unanimous court, discusses at great length the importance of indictment by the Grand Jury in our constitutional system. And, as we have seen from the passages of his opinion quoted above, he considers that the conclusions arrived at from a consideration of the constitutional provisions are borne out by general considerations of the legal principles underlying our system of criminal jurisprudence. One of the fundamental principles of Anglo-Saxon criminal jurisprudence is that the indictment must be so specific that no evidence may be offered of any other crime than that charged; and that if the crime proven at the trial varies in any way from that charged in the indictment the defendant is entitled to an acquittal.

The subject of variance has been discussed at great length by text-writers, and numerous decisions of the courts have turned on the application of the principle. But, clearly, if an indictment like the one at bar be good there can be no such thing as a variance, since *there is nothing in the indictment from which the proof could possibly vary.* And that brings us to the second of the constitutional guarantees here under consideration,—the constitutional guarantee that the defendant be informed of

the "nature and cause" of the charge against him. Indeed, in a certain sense, the two guarantees amount to the same thing, for if the indictment does not show the "nature and cause" of the charge, it is no indictment at all. They are, nevertheless, separate guarantees, and on occasion only one of them may come into play, as is illustrated by the *Bain* case. The defendant might be informed of the "nature and cause" of the charge against him,—that is to say the charge for which he is to be tried,—but that may not be the same charge as that which the Grand Jury had charged him with. The two guarantees must therefore be considered separately, and an indictment is, of course, bad if it fails to comply with either.

That the constitutional guarantee that the accused be informed of the "nature and cause" of the accusation against him has been violated in this instance is as clear as that the constitutional provision for indictment has not been complied with. Indeed more so, for it is clear that the indictment tells the defendants nothing as to the actual,—that is to say *factual*,—matters with which they are charged. To tell the defendants that they are charged with having obtained money from "shippers" in interstate commerce certainly does not tell them what facts the prosecution intends to present to the Trial Jury, and gives them no opportunity whatever to prepare their defense. *But that is exactly what an indictment is supposed to do.* It is supposed to give the defendant sufficient information to enable him to prepare for trial; and if it does not do that it is fatally defective.

Rosen v. *U. S.*, 161 U. S. 29.
Harris v. *People*, 64 N. Y. 148.

This branch of the discussion is perhaps best approached by a consideration of the case cited from the court of last resort of the State of New York, since that shows the extent of the principle of *variance* which underlies both of the constitutional guarantees here under discussion. In

that case the objection of *variance* was held not to be well taken. But the opinion of the court in overruling the objection is indicative of the great particularity which is required of an indictment in order to be good. The defendant in that case was indicted for committing perjury at a hearing conducted by a fire marshal in order to ascertain the cause of a fire and the amount of damage sustained. The defendant, the owner of the burned stock, was indicted for swearing falsely, among other things, that the burned stock consisted of 60,000 cigars. The evidence at the trial was to the effect that he had testified at the hearing that the stock consisted of 65,000 cigars. This was held to be an immaterial variance. In the course of its opinion the Court said:

> "We are also of the opinion that the variance was not material, and could be disregarded. And, for the purpose of testing this question, we must treat the case as if the indictment contained no other charge of perjury. The strictness of the ancient rule as to variance between the proof and the indictment has been much relaxed in modern times. Variances are regarded as material, because they may mislead a prisoner in making his defense, and because they may expose him to the danger of being again put in jeopardy for the same offense. The variance here could present no such difficulty. The indictment charged him with swearing falsely that he had 60,000 cigars in the building when, in fact, he swore that he had 65,000 there—a mistake in his favor. The falsehood did not consist so much in swearing to the precise number, for as to that he could be innocently mistaken, and preciseness was not important, but it consisted in swearing to a much larger number than he had. If the indictment had charged him with swearing falsely that there were 65,000 and he had proved that he actually had in his building 60,000, his oath would, considering the purpose for which and the circumstances under which it was given, have been regarded as substantially true, and the variance immaterial."
>
> *Harris* v. *People*, 64 N. Y. 148, 154.

B. The indictment herein clearly exposes the defendants to the danger of double jeopardy.

We have stated before that in most cases the constitutional requirement for an indictment by a Grand Jury and the requirement that the accused be informed of the "nature and cause" of the accusation come to the same thing and the two constitutional guarantees coalesce. We may now add that the second of the guarantees just referred to and the constitutional guarantee against double jeopardy also coalesce insofar as the indictment is concerned,—for each of these guarantees requires that the indictment state *specific facts*, indicating the facts constituting the crime charged with such precision that the defendant would be protected both against a variance in the proof and against a second prosecution for the same offense. The discussion of the problem of double jeopardy is, therefore, merely a different aspect of the same requirement as far as the indictment is concerned. That much is clear from the language of the Court of Appeals of the State of New York in the case just cited. It becomes even more clear when we come to examine the second of the brace of cases cited above, the one decided in this Court. The specific question involved in that case was whether the indictment complied with the constitutional requirement that the defendant be informed of the "nature and cause" of the accusation against him. But the opinion of this Court, like the opinion in the New York Court of Appeals in the *Harris* case, stated the rule which covers also the constitutional guarantee against double jeopardy.

Like the case from the New York Court of Appeals, the case in this Court is one in which the decision went against the defendant. But, like the opinion in the New York case, the opinion of this Court in the *Rosen* case, proves the indictment in the case at bar, to be fatally defective. The case in this Court was decided by a divided court, Chief Justice White, with whom Justice Shiras concurred, writing a strong dissenting opinion. But there was no difference of opinion on the basic principle involved,—and the

difference relating only to applicability in the particular case. The case involved a charge of mailing obscene matter through the mails. The indictment charged that on a day certain, the defendant deposited in the post office of the City of New York a publication which was described as follows:

> "which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, Broadway', and on the same page were printed the words and figures following,—that is to say, 'Volume II, number 27; trademark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, $4.00 a year, in advance'; and thereupon, on the same page, is the picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word 'tenderloineuse', and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand, eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows,—that is to say, 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.'"

The question in the case was whether under the exception to the rule requiring specification of the facts constituting the offense, which permits obscene matter to be omitted if so grossly obscene as to be offensive to the Court, the description quoted above was sufficient. As we have already stated, the majority of the Court held that it was, while Chief Justice White and Justice Shiras held that it was not. The majority of the Court in stating the rule applicable to sufficiency of indictments said:

> "A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged *as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime.*" (Italics supplied.)

And again:

> "The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense *and protect himself after judgment against another prosecution for the same offense.*" (Italics supplied.)
>
> *Rosen* v. *U. S.*, 161 U. S. 29, 34, 40.

But, the Court went on to say, that this rule, which is common to English and American jurisprudence has an exception, permitted in this country but not in England, where the crime charged is one referring to lewd and indecent matter. According to the American decisions, the Court said—

> "* * * this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, *provided the crime charged*, however general the language used, *is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him.*" (Italics supplied.)

And, the Court went on to say further, in the instant case the crime charged was sufficiently *identified* in the indictment to enable the defendant to prepare his defense and also to protect him against double jeopardy,—adding that further information that might be necessary in the preparation of the defense could be supplied by bill of particulars. It is clear that under the rule as thus laid down by the majority, the indictment in the case at bar is fatally defective, since it *does not* enable the defendants to prepare for trial, *and certainly does not protect them against double jeopardy.*

Clearly, an indictment which charges the defendant with having threatened to obtain money from "shippers" in interstate commerce does not sufficiently identify the particular offense to prevent double jeopardy. Before, however, discussing this phase of the case further, we must interrupt our argument for a brief space in order to refer to the opinion of the minority, for that harks back to the constitutional guarantee of prosecution by indictment. The main point made by Chief Justice White in his opinion on behalf of the minority was that, aside from the question of enabling the defendant to properly prepare his defense and protection against double jeopardy, the constitutional protection of prosecution by indictment was infringed, because the form of the indictment in that case offered no guarantee that the matter for which the defendant was convicted was *the exact matter* which the Grand Jury had in mind in finding the indictment. Said he:

> "'It must also be considered that, being an infamous offense, the prosecution can, under the 5th Amendment to the Constitution, only be by indictment. The necessity for identifying references in the indictment to the obscene matter *upon which the grand jury makes its findings* is an essential part of the rule dispensing with the obligation of stating the obscene matter, in so many words, in the indictment * * *
>
> "It being unquestionable that the grand jury must find an indictment in order that the prosecution be valid, *how can it be said that there has been such a presentment when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to be obscene?* To say that it can be supplied by a bill of particulars or otherwise is a misconception, for it becomes impossible to supply that which does not legally exist. The constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor anyone else, has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safeguards. *The general rule requires an indictment to be specific* (citing

cases). To this rule there has been evolved an exception. This exception, as we have said, is that where the publication or mailing of obscene matter is charged by a grand jury, such matter need not be stated in the indictment, provided in that instrument it be referred to and identified. Under the ruling now announced, it seems to us that the exception is made to destroy the rule, and that an indictment is held to be valid even if it makes no reference whatever to the matter relied on to show guilt. Thus the qualification as to the identifying reference by which alone the exception is justified disappears, and the result logically leads to the recognition of the right of a grand jury to present without stating or referring to the facts upon which its presentment is made, and also concedes the power of a prosecuting officer to supply matter in an indictment, and thus makes that which is absolutely void a valid instrument. The wisdom of the rule announced in Com. v. McCance was well illustrated by the indictment presented in that case, as it is by the alleged indictment under consideration here. *Will it be said that an indictment which charged that an accused published obscene matter contained in twenty volumes of books called the 'Encyclopedia Britannica or Americana', giving the title page and followed by the statement that a more minute description would be offensive to morality, would be adequate?*" (Italics supplied.)

Rosen v. *U. S.*, 161 U. S. 29, 45-48.

Well, it has been said by the Courts below in this case.

We need not go into the question of the extent of the exception to the rule upon which the majority and minority of this Court divided in the *Rosen* case. For in this case that exception does not come into play. And it is only necessary to add a word on the subject of double jeopardy.

That the indictment here under consideration does not furnish any protection whatever against double jeopardy is too clear to require extended argument. It must be borne in mind that the crime defined in the Anti-Racketeering Act is an ordinary crime of violence. We take it that it will be conceded that the substantive crime could not

be committed unless money or other "valuable consideration" was obtained from some *particular* person; and that an indictment for the substantive offense would not be good unless it named the person from whom the money or "valuable consideration" had been obtained. And that not only because a failure to specify the person from whom the money or "valuable consideration" had been obtained would not inform the defendant of the "nature and cause" of the accusation, *but also because it would furnish no protection against double jeopardy.* And, we respectfully submit, by the same token an indictment for "conspiracy to obtain" cannot possibly be good unless it names the person from whom the money or "valuable consideration" was to be obtained by the agreement which constitutes the conspiracy.

On the record, the defendants here stand convicted for having threatened *certain persons* with use of force and violence in pursuance to a claimed conspiracy to obtain money or other "valuable consideration" from them. In order that the conviction may be sustained, it must be assumed, as a matter of law, that those were the persons whom the Grand Jury had in mind in finding the indictment. But if the defendants were to be indicted again for a conspiracy to obtain money from the same persons or some of them,—*what is there in the indictment herein to prevent such new prosecution?* But under established legal principles *the indictment itself must furnish the protection by identifying the crime.*

To the same effect:

Rosen v. *U. S.*, 161 U. S. 29.
Bartell v. *U. S.*, 227 U. S. 427.
Martin v. *U. S.*, 168 Fed. Rep. 498.
Lambert v. *People*, 9 Cowan 578.
People v. *Kane*, 161 N. Y. 380.
People v. *Corbalis*, 178 N. Y. 516.
People v. *Zambounis*, 251 N. Y. 94.
Commonwealth v. *Eastman*, 55 Mass. 189.
Com. v. *McCance*, 164 Mass. 162.

C. The failure to allege an overt act renders the indictment demurrable.

Under the common law as understood in this country, no one can be indicted for conspiracy unless at least one of the conspirators has done some overt act in pursuance to the conspiracy. Such is also the modern law in England, as we understand that law to be. In most of the states of our Union the American interpretation of the common law of conspiracy has been embodied either in constitutional or legislative enactments; and such is also the case in our Federal system. And it has been held that this provision applies even to those criminal prosecutions which are laid under statutes containing specific provisions making a conspiracy to commit such acts a separate crime, without stating that an overt act is necessary to constitute a conspiracy thereunder.

U. S. v. *Reichert*, 32 Fed. Rep. 142.

In that case the prosecution was laid under a statute which read as follows:

> "Every person who enters into an agreement, combination or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain a payment or allowance of any false or fraudulent claim, shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand or more than five thousand dollars."

The Court, in speaking through Mr. Justice Field, Associate Justice of this Court, who presided at the circuit court at which the case was heard, *held*, that notwithstanding the fact that the particular statute under which the indictment there in question was laid did not make an overt act necessary to the conspiracy therein defined, an overt act was nevertheless necessary to constitute the crime, and that an indictment which failed to allege an overt act

was therefore demurrable. In the course of his opinion sustaining the demurrer Mr. Justice Field said:

> "I am of opinion that section 5440, Rev. St., amended by the act of May 17th, 1879, (21 St. 4), qualifies the provisions of section 5438; and that a conspiracy to defraud the United States, or to commit any other offense against the United States, is not, of itself, an indictable offense, unless the conspiracy be followed by some act in furtherance of it,—that is, to effect its object. Section 5440 applies to conspiracies to defraud the United States *in any manner or for any purpose*, and of course embraces the particular conspiracy mentioned in section 5438,—to defraud the government of the United States by 'obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim'. As, under section 5440, the conspiracy to defraud must be followed by some act to effect that object, to constitute a public offense, it would seem that, to the extent in which the section differs in that particular from the offense of defrauding the United States mentioned in the preceding section, (5438), it must be held to qualify and amend that section. Were this not so, we should have a general provision that in case of a conspiracy to defraud the United States *in any manner, or for any purpose*, it would be necessary to show the doing of some act to effect its object by one or more of the conspirators, to constitute the offense, with a previous provision that, in case of a conspiracy to defraud the United States *in a specified way*, there would be no necessity of showing any act to carry the conspiracy into effect."

U. S. v. *Reichert*, 32 Fed. Rep. 142, 145.

CONCLUSION

The indictment herein should be dismissed.

New York, November, 1941.

Respectfully submitted,

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